

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

Request for Comments of the Interpretation of)	
The TCPA in Light of <i>ACA Int'l v. FCC</i>)	WC Docket No. 18-152 & 02-278
)	FCC DA 18-493
)	
)	

COMMENTS OF NOBLE SYSTEMS CORPORATION

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Karl Koster
Chief Intellectual and Regulatory Counsel
Noble Systems Corporation
1200 Ashwood Parkway
Atlanta, GA 30338

SUMMARY

Noble Systems, a provider of contact center premise-based software and cloud-based contact center solutions, submits these comments in response to the Commission’s Public Notice of Comments On Interpretation of the Telephone Consumer Protection Act (“Public Notice”) in light of the D.C. Circuit’s ruling in *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (“*ACA Int’l*”).

Noble Systems encourages the Commission to clarify the scope of an automatic telephone dialing system (“ATDS”) using the statutory definition, with no more and no less than the indicated functions recited in the statutory definition. Doing so brings clarity to a topic that has been the focus of intense debate and past ambiguity. There is no need, and no statutory basis, to further graft into the definition of an ATDS any additional functions or limitations that are not stated in the Telephone Consumer Protection Act (“TCPA”) statute. Attempting to incorporate specific functions or capabilities impermissibly rewrites the statutory language. Interpreting the scope of an ATDS as limited by the statutory definition does not adversely impact the Commission’s ability to address the growing problem of illegal calls. As noted by Commission itself in a Congressional hearing, no further authorities are needed by the Commission to address the problem of illegal calls.

The statutorily defined functions for equipment that is an ATDS requires the equipment to use a random or sequential number generator to produce or store numbers and to dial those numbers. Defining additional functions, such as: how fast a large number of calls can be established, dialing numbers from a stored list, the degree of human intervention required to originate a call, or the relative ease of modifying the equipment’s functionality adds unnecessary ambiguity. These characteristics are not supported by the statutory definition of an ATDS, and are not needed to meet the goals the statute was intended to address.

An aspect of the TCPA statute that does require clarification is the language prohibiting the use of an ATDS to make calls. Two possible interpretations have been identified, one that clearly addresses the problem the statute was intended to solve, and one that does not. The Commission should select the interpretation that addresses the problem the statute was designed to address. Specifically, the Commission should interpret the prohibition of making calls made from an ATDS as involving using the statutorily defined functions when making calls.

Specifically, if the statutorily defined functions of an ATDS are not used to make a call, then that call should not be deemed as originating from an ATDS. To read the statute as prohibiting calls made without using the statutorily defined functions improperly broadens the scope of the prohibition beyond what Congress intended.

On the issue of reassigned numbers, the Commission should consider a broad interpretation of “called party.” The called party is the intended person or organization that the caller reasonably expected to reach. Once the call originator is actually informed that the number was reassigned, then the caller knows they will not reasonably reach the intended called party. This essentially results in an “actual notice” framework for informing the caller a number has been reassigned.

This should go hand-in-hand with mandating call originators offer mechanisms allowing a called party to provide actual notice of number reassignment. These mechanisms could be used by the called party to indicate revocation of consent to the caller for other purposes, such as to request cessation of calls which do not originate from an ATDS. The Commission should recognize that there are certain situations in which callers may receive unwanted calls, but which do not violate the TCPA, and hence may not be under the Commission’s TCPA regulatory authority. In some cases, there are other regulations or industry solutions (such as call blocking/call labeling) that are effective in addressing these situations.

On the topic of the scope of “persons” and aspects related to debt collection rules, Noble Systems reserves comments at this time.

TABLE OF CONTENTS

I.	SUMMARY	ii-iii
II.	UNDERSTANDING THE CONTEXT OF PORTIONS OF <i>ACA INT’L</i>	1
III.	SCOPE OF AN ATDS	5
	a. Background and Policy Considerations.....	5
	b. Interpreting “Capacity” as a “Present Capacity”	8
	c. The “Potential Capacity” Interpretation Has Not Been Applied to Other Portions of the TCPA (Nor Would it be Applied)	13
	d. “Store or Produce Telephone Numbers to be Called, Using a Random or Sequential Number Generator”	15
IV.	ONLY CALLS MADE BY EQUIPMENT USING THE STATUTORILY DEFINED ATDS FUNCTIONALITY ARE CALLS MADE BY AN ATDS.....	16
V.	THE COMMISSION SHOULD NOT INCORPORATE OTHER FUNCTIONAL ASPECTS INTO THE DEFINITION OF AN ATDS	18
	a. Human Intervention	18
	b. Other Functional Aspects Should Not be Incorporated into the Definition of an ATDS	24
	c. Combating “Robocalls” Does Not Require Adding Further Functions to the Definition of an ATDS.....	25
	d. Predictive Dialers Should Not Be A Motivating Reason for Adding Further Functions to the Definition of an ATDS.....	26
VI.	REASSIGNED NUMBER ISSUE	27
	a. Scope of the definition of “called party”	27
	b. The Issue May be Largely Mooted by the Definition of an ATDS	33
	c. This is Not a Problem Without a Solution	33
	d. Revocation of Consent	34

VII. CONCLUSION35

VIII. APPENDICES

Senate Report 102-178

House Report 102-317

I. Understanding the Context of Portions of *ACA Int'l*

The Commission issued the Public Notice to seek comments regarding what constitutes an ATDS in light of *ACA Int'l*.¹ The Public Notice poses a number of questions seeking input regarding the scope of an ATDS. These include questions directed to what “functions a device must be able to perform to qualify as an automatic telephone dialing system.”² The Public Notice continues with posing such questions:³

- The court further noted the Commission said another basic function was to “dial thousands of numbers in a short period of time,” which left parties “in a significant fog of uncertainty” on how to apply that notation.
- How “automatic” must dialing be for equipment to qualify as an automatic telephone dialing system?
- Does the word “automatic” “envision non-manual dialing of telephone numbers”?
- Must such a system dial numbers without human intervention? Must it dial thousands of numbers in a short period of time? If so, what constitutes a short period of time for these purposes?

The Commission appears to have interpreted *ACA Int'l* as indicating that such specific questions need to be answered by the Commission or that the Court implicitly agreed with certain underlying assumptions supporting these questions. That would be an error. The D.C. Circuit merely provided these questions and associated statements to support its holding that the Commission’s ruling was arbitrary and capricious. The Commission should not presume that answering such questions necessarily means any regulations based on those answers are either necessary or acceptable in defining the scope of an ATDS.

Reviewing the *ACA Int'l* decision at a high level add some contexts for some of the specific portions highlighted by the Commission in the Public Notice. Part I of *ACA Int'l* provides background, history, and purpose among other aspects.⁴ Part II begins by stating the standard by which agency rulings can be set aside (the “arbitrary and capricious” or “unreasoned” standard

¹ *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). All subsequent page references to this case are made using the slip opinion page numbers.

² Public Notice, p. 2.

³ *Id.*, pp. 2-3.

⁴ *ACA Int'l*, p. 5- 10.

under the *Chevron* test).⁵ Then, Part II.A addresses the Commission’s efforts to clarify what is an ATDS.⁶ Part II.A.1 addresses the “capacity” aspect of an ATDS, with subparts a – d focusing on various specific arguments related to this interpretation. Section II.A.1.d then ends by finding the Commission’s interpretation of “capacity” as “an unreasonably, and impermissibly, expansive one.”⁷

Next, in Part II.A.2, the Court indicates that having addressed the “capacity” issue of an ATDS, it now addresses the functions associated with the “capacity.”⁸ First, the Court indicates it has authority to review the issue.⁹ Next, the Court discusses the two statutorily enumerated functions of an ATDS, and indicates the Commission has sought to address questions regarding these functions.¹⁰ Next, the Court explains why the Commission’s recent efforts “falls short of reasoned decisionmaking....”¹¹ The Court then states on one issue regarding the statutory definition that the Commission offers “two minds on the issue.”¹² Next, “[t]o see why” this is the case, the Court discusses further details of the Commission’s perspectives.¹³ The Court then culminates the analysis of these two positions by asking, “[s]o which is it....?”¹⁴ The Court the adds:

It **might be** permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.¹⁵ (Emphasis added.)

The Court is not stating either one interpretation is correct, nor indicating a preference for one over the other. The Court is stating a fundamental basis for setting aside an agency ruling under the *Chevron* analysis – namely that the order lacks reason. To that end, the Court is stating that any agency decision offering two competing interpretations in the same order lacks reason.

⁵ *Id.*, p. 11.

⁶ *Id.*, p. 12.

⁷ *Id.*, p. 23.

⁸ *Id.*, p. 23.

⁹ *Id.*, part a., p. 23-24.

¹⁰ *Id.*, part b, p. 24-25.

¹¹ *Id.*, p. 25.

¹² *Id.*, p. 25.

¹³ *Id.*, p. 25 – 27.

¹⁴ *Id.*, p. 27.

¹⁵ *Id.*, p. 27.

“The 2015 ruling, while speaking to the question in several ways, give no clear answer (and in fact seems to give both answers).”¹⁶ If an agency decision interprets a statute as mandating “Widgets must be mostly square” while also stating “Widgets cannot be mostly square”, then it cannot be a reasoned decision. This can be ascertained without knowing the bounds of “mostly square” and without knowing the exact the scope of a “widget.”

The phrase “[it] might be permissible” suggests that the Court is hypothetically assuming that either interpretation may be permissible, without analyzing whether either one is correct. The Court does not say which interpretation is correct or preferred, but merely that both cannot stand together. Indeed, by using the phrase “might be” the Court is signaling that it did not undertake any rigorous analysis as to whether the statement is correct. Thus, the Court was *not* taking a position as to which of the identified functions was correct or necessary. Specifically, the Court was not suggesting that one position would be correct subject to the further questions (such as the functions of an ATDS) being addressed by the Commission.

The Court also provided the following paragraph characterizing the prior discussion and the following discussion which includes the “automatic” reference.

The uncertainty in the 2015 ruling, moreover, does not stop with the question of whether a device must be able to generate random or sequential numbers to meet the statutory definition. The ruling is also unclear about whether certain other referenced capabilities are necessary for a dialer to qualify as an ATDS.¹⁷

The very next paragraph begins with “*For instance*, the ruling states that the “basic function” of an autodialer is the ability to “dial numbers without human intervention.””¹⁸ Thus, the second paragraph on page 28 was intended to be an example of the lack of clarity as to “whether certain other referenced capabilities are necessary for a dialer to qualify as an ATDS.” The Court continues to discuss the Commission’s positions regarding human intervention, and concludes that this leaves a “fog of uncertainty about how to determine if a device is an ATDS....”¹⁹

¹⁶ *Id.*, p. 27.

¹⁷ *Id.*, p. 28.

¹⁸ *Id.*, emphasis added.

¹⁹ *Id.*, p. 29.

The Court essentially stated that the Commission’s rulings as written were unclear and on that basis set the ruling aside. The Court’s discussion does not address, e.g., whether the Commission can or should define additional functions. By stating “[i]t might be permissible for the Commission to adopt either interpretation”, the Court was not ratifying the correctness of either interpretation, nor ratifying that “human intervention” was a correct and necessary characteristic of an ATDS. The Court was only stating that these “side-by side propositions are difficult to square.”²⁰

The Commission appears to presume that the questions raised by the Court indicate the Court has ratified certain aspects. For example, the Commission seeks clarification on “the functions a device must be able to perform to qualify as an ATDS.” The Commission seeks input on one question raised by the Court, such as what it means to be “dialing thousands of numbers in a short period of time.” Correspondingly, the Commission now asks “what constitutes a short period of time for these purposes?” The Court did not ratify that this function is appropriate to be used to define an ATDS nor that any functions beyond the statutorily defined functions were necessary or even appropriate to be defined. The Court was merely pointing out that this characteristic was unclear.

If the Commission determines that the “short period of time” is e.g., 60 seconds (or some other value), that outcome may be precise and unambiguous. However, incorporating this requirement in a TCPA regulation may be arbitrary and/or exceeding the statutory authority given to the FCC. Returning to the widget example, an agency ruling stating both “Widgets must be mostly square” and “Widget cannot be mostly square” is not saved by defining what is “mostly square” if the regulation defines something else as a Widget. Nor, does it mean that selecting the first interpretation that widgets must be mostly square (even when “most square” is precisely defined) makes that regulation correct. The statute being interpreted may define a widget in such a way as precluding it from being square.

Consequently, for all of the questions the Commission seeks answers and comments regarding an ATDS, the Commission should carefully establish the basis for determining whether addressing any of these questions in a ruling first lies within the “agency’s zone of delegated

²⁰ *Id.*, p. 28.

authority.” The Commission should not presume that merely because the Court included some discussion on a question or function of an ATDS that the Commission should conclude that is appropriate to define such functions in a TCPA ruling. The Commission should first analyze whether it has the authority to incorporate that aspect into its ruling.

II. SCOPE OF AN ATDS

a. Background and Policy Considerations

The TCPA prohibits “mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system....”²¹ The FCC requests comments on what constitutes an “automatic telephone dialing system” (“ATDS”) to aid in its interpretation of an ATDS under the TCPA. It is well recognized that the TCPA provides a definition of an ATDS, which is:

equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.²²

This definition of an ATDS achieves a key goal of a problem that the TCPA was intended to address. The TCPA was passed in 1991 to address the growing use of computerized dialing equipment in the 1980’s. During this time, computer controlled devices were used to originate calls and play a prerecorded message from a cassette player to the party answering the call. The congressional record discusses several problems that arose as a result of the indiscriminate dialing practices used by telemarketers with the primitive computerized dialing equipment.²³ Indiscriminate dialing resulted when computer based equipment was programmed to dial a random or sequentially generated telephone number.²⁴ The latter involved indicating a range of numbers to be dialed, such as dialing all the telephone numbers (212) 418-0000 through (212) 418-9999. Both of these approaches of generating telephone numbers to dial resulted in calls being

²¹ 47 U.S.C. 227 (b)(1)(a).

²² 47 U.S.C. 227 (a)(1).

²³ Attached to these comments are a copy of the House Report 102-317 (“H.R.”) and Senate Report 102-178 (“S.R.”) for reference.

²⁴ See, e.g., S.R., page 2 describing problems when telemarketers “call numbers randomly or sequentially”; H.R., page 10, describing how “[t]elemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers.”

established to hospitals, police stations, first responders, and other parties that would obviously have no interest in receiving telemarketing calls. Rather than buying a list of numbers (which was costly by itself)²⁵ and which required using more sophisticated computer controlled dialing equipment to process that list of numbers,²⁶ any person could instead set up their own primitive telemarketing business with their existing home or business phone line (or two or four) by using this less expensive device to blast sales messages in their local area.²⁷ An existing small business already having several phone lines could simply placing these devices in a closet and begin a telemarketing program.

Indiscriminate dialing also resulted in calls made to individuals using cell phones, which at that time were comparatively expensive to use.²⁸ Another undesirable aspect was due to the nature of the telephony technology used at that time. Namely, “automatic dialing systems” (which referred to device playing pre-recorded announcements)²⁹ frequently resulted in “tying up” a residential (wireline telephone) called party’s line.³⁰ Calls that played a pre-recorded announcement to a residential line would “tie up” the called party’s telephone line *after* the called party answered and then hung-up the phone. After the called party hung up, the telephone line remained connected to the caller’s equipment playing an announcement. Thus, if the called party went “off-hook” (i.e., lifted the handset off of the telephone set to make a call), the called party would still hear the announcement being played. It would sometimes take 30 seconds for the call to be completely terminated after the answering party when “on-hook” (hung-up the handset).³¹ Dialing sequentially generated telephone numbers impacted businesses having multiple telephone lines with sequentially assigned telephone numbers as they would find all their telephone lines tied

²⁵ See e.g., H.R. pp. 7-8.

²⁶ This would require a computer with disk drives, keyboard, and monitor, which at that time was several thousands of dollars.

²⁷ Such devices were known as ADRMP (automatic dialing recorded message players) or a ADAD (automatic dialing and announcing devices). See, e.g., S.R. p. 2.

²⁸ S.R., p. 2.

²⁹ See, e.g., H.R. p. 6, “Automatic dialing systems (automatic telephone dialers coupled with recorded message players) ensure that a company’s message gets to potential customers in the exact same way, every time, without incurring the normal cost of human intervention.” See also, S.R. p 2, describing the reasons for consumer complaints is due to the use of “automatic dialer recorded message players (ADRMPSs) or automatic dialing and announcing devices (ADSDs). These machines automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message.”

³⁰ S.R., p. 10.

³¹ *Id.*

up when sequentially based telephone numbers were dialed. These businesses could not receive incoming calls nor make outgoing calls for periods of time.

Banning dialing equipment that used random or sequential number generators that produced/stored the telephone numbers to be dialed was seen as a solution to the problem of indiscriminate dialing. Thus, Congress defined an ATDS in the statute and prohibited its use to call certain numbers. Congress did not prohibit using a computer to dial calls.³² An ATDS could be used to deliberately dial a hospital, police station, or cell phone number, as long as that equipment did not generate and dial the number using a random or sequential number generator or consent was obtained in advance.³³ Thus, the definition of the ATDS in the statute was carefully tailored to address this problem.

The TCPA also included provisions to preclude playing pre-recorded announcements to residential lines and established a national do-not-call database to prevent unwanted telemarketing calls. Taken as a whole, the TCPA addressed the problems of a) unwanted telemarketing calls, b) calls delivering unwanted pre-recorded announcements to residential lines, and c) indiscriminate dialing to certain categories of destinations. Congress granted the Commission authority to interpret the TCPA, but Congress did not grant free reign on the Commission to regulate any type of computer controlled dialer as Congress limited the definition of an ATDS in the statute.

The Commission now seeks input on the scope of an ATDS, including the interpretation of “capacity” in the statutory definition of an ATDS and which further functions are necessary for equipment to be considered an ATDS. Noble Systems proposes that the interpretation should be consistent with how Congress intended the TCPA to address the problems of indiscriminate dialing, unwanted telemarketing calls, and unconsented prerecorded announcements. The *ACA Int’l* ruling shows the result of the Commission adopting an overly broad statutory interpretation of ATDS, which exceeded the scope of the problem to be addressed and the Commission’s authority. The D.C. Circuit has cautioned the Commission from extending the statutory definition of an ATDS in order to regulate modern technologies in perpetuity.³⁴ With this understanding, if

³² Congress was well aware that other telemarketers did not use such automated equipment to make calls playing recorded announcement. S.R. p. 5-6.; see also. H.R. page. 8.

³³ See e.g., S.R. p. 3, defining automated calls should be permitted if consent is received.

³⁴ *ACA Int’l*, p. 20.

newer technologies must be regulated, it is not the Commission's role to redefine an ATDS to cover new technologies.

The meaning of “capacity” in the statutory definition should be interpreted as a “present capacity” of the statutorily defined functions. Congress intended to address the problems of indiscriminate dialing that resulted in calls being placed to certain categories of destinations, and precluding the recited functions from being used in dialing equipment was effective in addressing that problem. No further functions should be incorporated into the ATDS definition beyond what is defined in the statute. The additional functions identified by the Commission in the Public Notice are not needed to address problems of indiscriminate dialing, unwanted telemarketing calls, and unconsented prerecorded announcements to residential lines. Incorporating any additional functions to the statutorily defined functions of an ATDS will prove to be just as problematic as past attempts have proven to be.

Further, the effort to incorporate additional functions necessary to identify an ATDS may be rendered moot based on how other aspects of the TCPA are interpreted; specifically how the prohibition of using an ATDS to make a call is to be interpreted.

b. Interpreting “Capacity” as a “Present Capacity”

The statutory definition states an ATDS is “equipment which has the *capacity* – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” An issue presented in the *ACA Int'l* appeal involved the scope of the term “capacity.” Two competing interpretations were offered: the first interpretation was commonly referred to as the “*present capacity*” interpretation and the second was referred to as the “*potential capacity*” interpretation.

Noble Systems, as with the other plaintiffs of *ACA Int'l*, submits the “present capacity” interpretation is preferred and should be adopted by the Commission. Although the *ACA Int'l* did not explicitly state that the “present capacity” interpretation is preferable, it did state that “[i]t is untenable to construe the term ‘capacity’ in the statutory definition of an ATDS in a manner that brings within the definition’s fold the most ubiquitous type of phone equipment known....”³⁵ The

³⁵ *ACA Int'l*, p. 17.

Court was referring to the “potential capacity” interpretation offered by the Commission. Hence, to the extent that *ACA Int’l* rejected the potential capacity interpretation, the only logical conclusion is that the “present capacity” interpretation is preferred. Further, adopting a “present capacity” interpretation is unlikely to result in the Commission overstepping its authority and likely to be upheld if appealed.

The “present capacity” interpretation means that the statutorily defined functions must be present in equipment for it to be an ATDS. Specifically, the statutorily defined functions of an ATDS consist of 1) a random or sequential number generator that generates a telephone number(s) and 2) the capability to dial the number(s) generated to make a telephone call. For simplicity, these may be referred to herein as “a random/sequential number generator” and “dialing” functions (or similar shorthand language). It should be noted that these statutorily defined functions require that they interact together. That is, it is not sufficient that equipment has a random/sequential number generator and a separate ability dial a number to make a call. The requirement is that the random/sequential number generator generates telephone numbers which are then dialed to make calls.

The use of a sequential number generator for initiating calls was well known prior to the passage of the TCPA in 1991, as evidenced by U.S. Patent 4,188,510, entitled Telephone Sequential Number Dialer with Number Incrementing, filed in 1978.³⁶ Another patent detailing a system for indiscriminate dialing is U.S. Patent 3,943,289³⁷, entitled Automatic Telephone Caller, filed in 1974 , 17 years prior to the passage of the TCPA. Random number generators were also well known, as described in U.S. Patent 4,922,520, entitled Automatic Telephone Polling System, filed in 1989.³⁸ One can imagine the havoc such devices caused when use to dial random or sequentially generated telephone numbers.

Using the present capacity interpretation allows equipment that is an ATDS to be readily identified. The statutorily defined functions are clear: a device that is capable of generating telephone calls using a random or sequential number generated, then it has the requisite functionality. If these statutorily defined functions can be identified in the equipment in question,

³⁶ <https://patentimages.storage.googleapis.com/24/d3/aa/275bab6d835b7a/US4188510.pdf>

³⁷ <https://patentimages.storage.googleapis.com/37/2b/7c/20625e71e8090f/US3943289.pdf>

³⁸ US Patent 4,599,493, filed in 1984 disclosed a system for what is essentially predictive dialing.

then the equipment is an ATDS. If the statutorily defined functions cannot be identified, then the equipment is not an ATDS. While past equipment may have incorporated circuitry to generate these functions (see, e.g., U.S. Patent 4,188,510), more modern equipment uses software to perform these function (see, e.g., U.S. Patent 4,922,520 disclosing a microprocessor for generating the random number).

Many modern dialer vendors do not incorporate such functionality today. This was acknowledged by the Court. “And at least some predictive dialers, as explained, have no capacity to generate random or sequential numbers.”³⁹ Indeed, for many applications, the call center operator desires to direct each call to a specific intended person (a customer), the purpose of which would be frustrated if they dialed indiscriminately. For example, attempting to notify the owner of a particular automobile of a safety recall by using a random or sequential number generator to generate the telephone numbers would be an absurd practice today. In contrast, at the time the TCPA was approved, a major problem to be addressed involved indiscriminately “blasting” telemarketing messages.⁴⁰ To the extent the TCPA eliminated indiscriminate dialing by legitimate operators, the TCPA should be viewed as successful.⁴¹

As noted above, proving equipment is an ATDS using a “present capacity” interpretation requires that the statutorily defined functions (software or corresponding circuitry) must be identified in equipment. Those skilled in the art would be able to identify whether software code or circuitry performs the statutorily defined functions in equipment that originates the calls. Thus, the test is not whether one could write, augment, modify, combine, or change the existing code or circuitry to perform the existing statutory functions, but merely to show they are present.

In contrast, using a “potential capacity” interpretation is problematic. First of all, given enough time and money, anything can be modified to perform these functions. For example, a kitchen appliance could be theoretically modified to add hardware/software to perform these functions. Because of such extreme hypothetical situations and the acknowledgement that anything could be modified, the question has evolved from not whether equipment can be

³⁹ *ACA Int’l*, p. 27.

⁴⁰ Indeed, much of the Senate Report and House Report discuss the delivery of telemarketing messages.

⁴¹ It is recognized many illegitimate operators and scammers engage in indiscriminate dialing that play pre-recorded messages, but other regulations were intended to target these types of calls, such the DNC list, the prohibition of playing pre-recorded messages, and the prohibition of using a spoofed caller ID with the intent to deceive.

modified, but rather how difficult would it be to modify a piece of equipment? (Or some variation of this question.)

As expected, the answer to such a question is fact-based and subjective. This type of test will never offer sufficient guidance to render a regulation unambiguous and useful for judicial determination. Adopting a “potential capacity” interpretation is rife with uncertainty, as it attempts to address hypothetical considerations of how much is involved to modify equipment to perform the statutorily required functions. There is no clear delineation as to how much “reconstruction” or “modification” of equipment is required for such “potential capacity” to exist.

Consider the supposedly simple issue of how much effort is required to modify software in processing equipment to add a random/sequential number generator function. Assume the equipment is some form of a computer processor based device such as a smartphone. It is recognized that software can be readily installed on a smartphone by an end-user downloading a mobile application to the smartphone. The ease and speed of this task is relatively simple and fast. (Although a number of years ago, doing so was not readily feasible, reflecting how technology can change the analysis significantly.) Next, consider the situation when the device is an enterprise PBX. Modifying this software could be accomplished by installing an application program on a PBX, which may require additional skill and time by an information technology (“IT”) professional compared to an end user downloading a mobile application on a smartphone. Finally, consider if the device is a computer server; modifying software in this case may require physically replacing a PROM (programmable read-only memory) chip that stores software. If the PROM chip is soldered to the motherboard, this could be extremely complicated to replace and is well beyond the skills of a typical IT professional. There are a number of variations in-between these extremes. However, attempting to define which of these hypothetical mechanisms constitutes a permissible approach for modifying software is not likely to be an easy task and one the Commission should not undertake, nor expect judges to perform this task.

When considering the problems addressed by the TCPA, namely that indiscriminate calling should be prevented as well as protecting the privacy of individuals, it become tenuous to see how these problems are addressed by analyzing the relative ease of how software could be modified in these different devices. There is no statutory support, nor any evidence in the record, that Congress

intended the Commission to address the problem of indiscriminate dialing by having the Commission regulate how easy it is to update software to potentially perform the statutorily defined functions. Congress effectively addressed the problem of indiscriminate dialing by prohibiting the use of equipment having the statutorily defined functions, as opposed to prohibiting equipment which could be modified to incorporate the statutorily defined functions.

Addressing questions of how much effort is required to reconstruct a device in order to transform the device from a non-ATDS into an ATDS is exactly the question that industry seeks to avoid. Hypothetical considerations of what functional modifications may be required to equipment to make equipment into an ATDS (e.g., ‘flipping a switch’) is similar to the above hypothetical examples of modifying software of a device to make it into an ATDS. At what level does the reconstruction exceed a threshold necessary to transform it into an ATDS? Would replacing one integrated circuit or altering one drop-down menu option be simple enough or would replacing two or more circuits or several drop-down menu options be too complicated? How is this exercise even useful? The Commission should not expect judges or juries to engage in evaluating hypothetical scenarios involving future changes, modifications, or additional functions that are needed to transform equipment into an ATDS.

The D.C. Circuit indicated the question of how to interpret the definition related to “present” or “potential” capacity may turn on as to “how much is required to enable the device to function as an autodialer.”⁴² This language can be interpreted as the Court rephrasing the parties’ position as to the interpretation of “capacity.” The Court’s language posed rhetorical questions (such as whether this involves the simple flipping of a switch or a top-to-bottom reconstruction) which the Court did not answer, nor mandate an answer. Rather, the Court posed the questions in order to demonstrate that the Commission’s 2015 Order was arbitrary and/or capricious. The Court used this analysis in the context of discussing how the Commission’s interpretation was overly broad and concluded that “the Commission’s interpretation of the term “capacity” in the statutory definition of an ATDS is ‘utterly unreasonable in the breadth of its regulatory [in]clusion.’”⁴³

⁴² *ACA Int’l*, pp. 13, 14.

⁴³ *ACA Int’l*, p. 19.

The text should not be interpreted as recommending the Commission undertake defining whether simple flipping of a switch is sufficient nor addressing what constitutes a “top-to-bottom reconstruction” of the equipment. The analysis was merely part of the Commission’s perspective of why the Commission’s interpretation was overly broad. The Court was not stating had the Commission defined exactly what the functions of an autodialer were then the Commission’s interpretation would have been upheld. In fact, the Court did not even imply that the Commission had authority to define any additional functions beyond those in the statutory definition. Because the Court found the Commission’s interpretation were overly broad and/or ambiguous, and held that the Commission’s interpretation failed the “arbitrary and capricious” test, the Court had no reason (nor any opportunity) to further address the issue of whether the Commission had authority to even define such functions.

Interpreting an ATDS as equipment having a present capacity addresses the issues the TCPA was intended to solve. Because indiscriminate dialing was caused when equipment dialed random or sequentially generated telephone numbers, defining an ATDS as equipment that incorporates those functions along with prohibiting the use of such equipment effectively addresses the problem. Prohibiting use of equipment that is configured to dial random or sequentially generated telephone numbers is carefully tailored to resolve the problem of indiscriminate dialing. On the other hand, defining equipment that could be so modified is an overly broad attempt to resolve the problem of indiscriminate dialing.

c. The “Potential Capacity” Interpretation Has Not Been Applied to Other Portions of the TCPA (Nor Would it be Applied)

The TCPA includes a corresponding prohibition on sending advertisements using a computer to a facsimile machine. Specifically, the language states:

Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement...

Further, the TCPA also includes a definition of a telephone fax machine.

The term “telephone facsimile machine” means equipment which has the *capacity* (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper. 47 USC. 227 (a)(3)(emphasis added).

It is well recognized that a desktop or laptop computer can be modified by installing software to perform fax handling functions, specifically to receive telephone faxes. Such applications can also be readily downloaded for a smartphone. Thus, adopting a “potential capacity” interpretation results in a smartphone or a computer having the potential capacity to perform the statutorily defined functions of a telephone facsimile machine. Therefore, one would conclude by using a “potential capacity” interpretation essentially every smartphone and computer today is a “telephone facsimile machine” *even though such functions may not be used, nor may be even present, in the smartphone or computer when it receives an advertisement*. If this logic is applied, then any unsolicited advertisement received by a smartphone or computer in an email or on a web page would violate the TCPA for sending an unsolicited ad to a fax machine.

Applying a “potential capacity” interpretation in this part of the TCPA has not been done, nor would the Commission likely tolerate such an interpretation. Congress addressed the junk fax problem by defining a “telephone facsimile machine” and prohibiting its use for sending unsolicited advertisements. Similarly, Congress addressed the problem of indiscriminate dialing by defining an ATDS and prohibiting its use for calling certain types of numbers. In neither case does adopting such an unreasonably broad interpretation of “capacity” better address the problem Congress was attempting to solve. In both instances, the preferred interpretation of “capacity” is one that refers to current functions present in the equipment, and the prohibition pertains to using those functions in that equipment to initiate a communication. There is no persuasive reason why “capacity” would have one meaning in the TCPA when defining an ATDS and another meaning when defining a facsimile machine.

d. “Store or Produce Telephone Numbers to be Called, Using a Random or Sequential Number Generator”

The interpretation of this phrase has raised questions relevant to the scope of an ATDS. While it is clear how a random or sequential number generator can be used to *produce* a telephone number, the question has been raised: how can a random or sequential number generator be used to *store* a telephone number? Generating a sequence of numbers inherently requires generating more than one number. Those familiar with algorithms or circuits for generating sequential numbers will readily appreciate how a sequential number generator (as well as a random number generator) can be used to store such numbers.

In order to generate a sequence of telephone numbers and call them, there are two fundamental approaches using a sequential number generator. One approach is to generate an initial telephone number and then originate a call. This is the approach described in the aforementioned U.S. Patent 3,943,289. The process is repeated for each number generated in the sequence. In this manner, only one number is stored at a time. The other approach is to use the sequential number generator to generate all the numbers to be dialed (prior to dialing), and this inherently requires storing the numbers and then dialing the numbers. In this latter approach, it is readily appreciated that the sequence of numbers stored in memory could be considered a list. In this manner, one skilled in the art would recognize how a sequential number generator can be used to generate and store numbers that are to be dialed.

For the sake of illustration, assume that 100 numbers are to be generated. The sequential number generator will typically start with a given initial number stored in a working register (a special purpose memory location), and using that number, generate the next number, which is also retained in the working register. In order to preserve that number for future use, it will be copied to another memory location where the sequence of numbers will be found. Then, the sequential number generator will generate the next number in the sequence using the same process. Quite often, this is accomplished by adding one to the existing number found in the register. In order to preserve this second number, it too will be copied to the next available memory location relative to the first number. This results in the sequence of numbers stored in memory.

There is no meaningful distinction in the result between generating sequential numbers that are dialed one at a time or generating numbers stored in a list which are then dialed. Both approaches result in calls being indiscriminately dialed using sequentially generated telephone numbers. Presumably, Congress did not intend one approach to be allowable and the other prohibited, since both approaches result calls being indiscriminately dialed. Thus, the statutory language is readily understandable, and involves a sequential number generator producing and storing the number to be dialed.

That a computer may be capable of dialing sequentially generated telephone numbers stored in a list is an ATDS should not interpreted that such equipment also is an ATDS. *ACA Int'l* considered this argument and dismissed this interpretation.⁴⁴ The definition of an ATDS specifically recites “a random or sequential number generator” and reading that limitation out of the definition ignores these specific words in the statute, rendering them superfluous. Because a key purpose of the TCPA was to stop indiscriminate dialing, reading out “random or sequential number generator” unduly broadens the scope of the ATDS definition.

III. ONLY CALLS MADE BY EQUIPMENT USING THE STATUTORILY DEFINED ATDS FUNCTIONALITY ARE CALLS MADE BY AN ATDS.

Based on a plain reading of the statutory definition of an ATDS, an ATDS must have the statutorily defined functions of storing or producing telephone numbers to be called, using a random or sequential number, and dialing such numbers. The Commission seeks input on a fundamentally important issue, which was identified in the D.C. Ruling, but which was not briefed in that case.⁴⁵ That question is: does the TCPA prohibit making a call from equipment which is an ATDS even if the statutorily defined ATDS functions are not used by the equipment in making the call?⁴⁶ The issue is fundamentally important because resolving this question has the potential to render moot other issues raised by the Commission.

⁴⁴ *ACA Int'l*, p. 25-26.

⁴⁵ *ACA Int'l*, p. 31. “Petitioners, however, raise no challenge to the Commission’s understanding of the statutory words, “make any call using” an ATDS....Our consistent practice is such a situation is to decline to address (must less resolve) the issue.”

⁴⁶ In such instances, it is assumed that no consent is present to call the enumerated types of numbers.

Only a call originating from equipment using the statutorily defined functions should be considered as a call originating from an ATDS. First of all, Congress passed the TCPA to address the problems of the invasion of privacy caused by indiscriminate calling. It is clear that prohibiting calls that originate using randomly generated or sequentially generated telephone number addresses that issue. Prohibiting calls from equipment having the functions, but where the functions are not used, further results in prohibiting calls that are purposefully directed to a particular identified number (i.e., not one randomly or sequentially generated). This does not serve to address the problem identified by Congress.⁴⁷ Thus, prohibiting calls that are deliberately targeted to a wireless number simply because of technology present in the calling device, but which was not used, is not focused on the problem of curbing indiscriminate dialing. It is an overly broad construction of the statute and for that reason is to be discouraged as opposed to a construction that is tailored to addressing the problem.

The situation of considering a call as originating from an ATDS when the statutorily defined ATDS functions are not used has some parallels to considering a smartphone as an ATDS even when it presently does not have the statutorily defined functions. *ACA Int'l* vacated the FCC's broad characterization of an ATDS as being overly broad in light of the current ubiquitous use of smartphones. It was deemed unreasonably broad to prohibit using a wireless smartphone to call another wireless number simply because the caller *could have* downloaded certain software on the smartphone, but did not. What if the smartphone user had downloaded such software, but had not used it to make a call. Is that situation any worse, such that it warrants regulation? What if the user is unaware that a mobile application (secretly) incorporates software code for dialing random/sequential numbers, but the user never uses that mobile application? Should calls from these types of smartphone be considered as calls from an ATDS? What purpose would this serve?

In a similar situation, many commercially available cloud networking providers host call center applications. In fact, a number of cloud providers advertise offering cloud based contact center services, such as predictive dialing or manual dialing solutions.⁴⁸ If one cloud-based dialer

⁴⁷ H.R., p. 10, "Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers."

⁴⁸ See, e.g., <https://aws.amazon.com/connect/>. See, also, <https://www.aspect.com/landing-pages-2017/cloud-contact-center-aspect-via-directory>, accessed June 8, 2018.

application happens to incorporate a random/sequential number generator that is able to make calls, then would this dialer application ‘contaminate’ all other contact center providers using their own applications on that same cloud provider, but which applications did not incorporate random/sequential number generators? It is absurd to argue that because such prohibited software exists in one application on a cloud network service provider then all other applications running on that cloud network are somehow ‘contaminated.’ If merely having such software present in the computing environment is adopted as defining an ATDS, then Commission will be spending its time defining regulations delineating as to what constitutes an “ATDS application” in a cloud computing environment or what is “ATDS application enabled application program” in a cloud environment. This will rapidly become a quagmire, complicated further when considering virtual machine environments, shared application servers, etc. The Commission should not take this path.

Congress was attempting to prevent calls from being made on an indiscriminate basis to wireless numbers by prohibiting certain technology from being used to make those calls (i.e., a random or sequential number generator). If that technology was not used to make a call, then there is no reason prohibit that call. This simple policy analysis supports the proposition that only when the statutorily defined functions in an ATDS are used to make a call, should the call then be considered as originating from an ATDS.

IV. THE COMMISSION SHOULD NOT INCORPORATE OTHER FUNCTIONAL ASPECTS INTO THE DEFINITION OF AN ATDS

a. Human Intervention

There concept of a “human intervention” test has been discussed, and presumably this implies that a call requiring human intervention to originate cannot be a call from an ATDS. That is, calls from an ATDS are presumed to be, in some form, automatically initiated calls. The basis for incorporating this function appears to be that the term “automatic telephone dialing system” incorporates the word “automatic” and this implies a lack of human involvement. The D.C. Circuit in *ACA Int’l* provided a cursory approval of this understanding when commenting on the Commission’s ‘basic notion’ of an autodialing involving human intervention. The Court stated: “That makes sense given that “auto” in autodialer—or, equivalently, “automatic” in “automatic

telephone dialing system,” 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers.”⁴⁹

Several points should be kept in mind regarding this statement. First, the D.C. Circuit’s language is dicta only; it does not represent a complete analysis by the Court of whether the Commission had authority or a correct interpretation of this function. The phrase “this makes sense” and “would seem to envision” indicates the Court *did not* thoroughly analyze this issue and signals that the Court *presumed* this was a proper interpretation. In a larger context, this statement is provided by the Court as example of a capability where “[t]he ruling is also unclear about whether certain other referenced capabilities are necessary for a dialer to qualify as an ATDS.”⁵⁰ The Court then discusses an inconsistency in the Commission’s rulings regarding this issue, concluding that such guidance was so unclear that the “affected parties are left in a significant fog of uncertainty about how to determine if a device is an ATDS....”⁵¹

Thus, the Commission should not interpret the Court’s language as a requirement for defining an ATDS or a correct statutory interpretation. The Court merely took the position that this regulatory interpretation by the Commission could not be squared with another regulatory interpretation by the Commission, and therefore the Court set aside the Commission’s treatment of this matter in part because of the “order’s lack of clarity of which functions qualify a device as an autodialer.”⁵²

Noble Systems is sympathetic to aspects of the “human intervention” test because prior Commission Orders have left the industry in a “significant fog of uncertainty about how to determine if a device is an ATDS....”⁵³ Several district court cases have used the Commission’s criteria of human intervention in ruling that certain dialing equipment is not an ATDS. The ‘human intervention’ test is arguably easier for courts to apply relative to some of the other criteria (such as the “potential capacity” interpretation which is highly subjective and undefined as to how much

⁴⁹ *ACA Int’l*, p. 28.

⁵⁰ *ACA Int’l*, p. 28.

⁵¹ *Id.*, p. 29.

⁵² *Id.*

⁵³ *Id.*

effort is required to modify a piece of equipment). Hence, it is surmised that courts have latched onto using this test because it is comparatively simpler than the other criteria available to them.

However, simplicity is not a basis for adopting this test as a characteristic of an ATDS. First, the statutory definition of an ATDS does not mandate or suggest this term. Presumably, Congress would have included this term in the definition of an ATDS if this criteria was intended.

Second, the basis for including this function into the definition of an ATDS is troubling. It appears the basis to incorporate the human intervention test is based on the word “automatic” in the phrase “automatic telephone dialing system.” Reading the term “automatic” into the definition of an ATDS appears to disregard the entire purpose of Congress providing a definition of an ATDS. The purpose of the definition is to unambiguously indicate what that phrase means and the statutorily defined functions do not include any requirement of “human intervention.” The assumption is that because the term “automatic” is part of the phrase being defined, it is therefore appropriate to graft in characteristics of that word into the definition of an ATDS. As noted by the D.C. Circuit, “‘automatic’ in ‘automatic telephone dialing system,’ 47 U.S.C. § 227(a)(1) – would seem to envision non-manual dialing of telephone numbers.”⁵⁴

However, based on that same logic, it should be appropriate to graft in characteristics for the words “telephone” and “dialing,” which also appear in the phrase. In 1991, the word “telephone,” as used in 47 U.S.C. § 227, which is under a section entitled “Restrictions on Use of Telephone Equipment,” which in turn is under a section entitled “Common Carrier Regulations”, would be understood as equipment comprising a conventional rotary dial or push-button telephone device used to make telephone calls, and which interfaces with a telephone common carrier, such as a public switch telephone network provider. A “telephone” at that time would not be understood to be a computer connected to a data network.

Further, the word “dialing,” in light of a telephone interfacing with a common carrier, would be understood at that time as involving conventional analog signaling that was commonly used for interfacing a telephone with the public switched telephone network (“PSTN”). This line-side analog signaling would involve using, e.g., dial-pulse signaling or dual tone multiple frequency signaling by a telephone. The word “dialing” as used in the TCPA statute would not

⁵⁴ *ACA Int’l*, p. 28.

have been understood at that time to involve devices using VoIP or SIP digital signaling for establishment of calls. SIP was reported as designed in 1996 and standardized as RFC 2543 in 1999.⁵⁵ So, SIP did not even exist when the TCPA was passed. Furthermore, VoIP providers were not considered as a common carrier regulated by the statute. It would be odd for Congress to expect that the definition would include VoIP devices as an ATDS when they were equipment used with VoIP providers who were not even regulated as a common carriers.

Thus, if we agree to incorporate aspects of “automatic” into the statutory definition, then there is a plausible argument that aspects of “telephone” and “dialing” should also be grafted into the ATDS definition. Doing so would exclude digital computers using a digital signaling protocols, which were not used for making calls in 1991. Incorporating aspects of these other terms in the definition of an ATDS would have the effect of excluding all modern day VoIP devices that originate calls using SIP signaling from being an ATDS. It is surmised that the Commission does not seek to achieve this result.

Noble Systems believes that to be consistent, *none* of the functions associated with “automatic,” “telephone,” nor “dialing” should be grafted into the definition of an ATDS at this time. These functions do not appear in the statutory definition and incorporating any of them appears to ignore the determination that Congress must not “have intended the term “automatic telephone dialing system” to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time.”⁵⁶

Another reason why “automatically” should not modify the definition of an ATDS is that it would be inconsistent to apply such logic to the sending an unsolicited facsimile advertisement. If the definition of an ATDS must “automatically” generate and dial such numbers because of the word “automatic”, then similarly, the TCPA’s prohibition of using a facsimile machine should also be modified. The prohibition of using a facsimile machine is under 47 USC 227(b) which is entitled “Restrictions on Use of **Automated** Telephone Equipment.” (Emphasis added.) Thus, under the same logic, a facsimile machine would be considered “automated.” Since the prohibition

⁵⁵ See, e.g., https://en.wikipedia.org/wiki/Session_Initiation_Protocol.

⁵⁶ *ACA Int'l*, p. 20.

pertains to using a facsimile machine “to send...an unsolicited advertisement”, one could argue that Congress similarly intended to only restrict the *automatic* sending of unsolicited advertisements. This would lead to the result that Congress did not intend to prohibit manually initiated unsolicited facsimile advertisements. This is a perverse outcome that contradicts the problem Congress was addressing. Likely, no one would agree that the logic for adding “automatic” for dialing calls/generating numbers for an ATDS should be extended to the TCPA prohibition of sending unsolicited facsimile advertisements. The better conclusion is that Congress intended the definitions and prohibitions to be interpreted solely as defined in the statute without grafting in further limitations.

Further, another reason not to graft any of these additional aspects into the definition is that it would needlessly limit the scope of an ATDS with respect to addressing the problem of indiscriminate dialing. Prohibiting equipment configured to use a random/sequential number generator for generating indiscriminately dialed calls is a problem to be avoided: 1) regardless of whether the calls are automatically established or not, 2) regardless of whether the device is a conventional telephone or a computer originating calls, and 3) regardless of the type of signaling used to establish the call. Indiscriminate dialing is just as undesirable now as it was in 1991 when the TCPA was passed, regardless of technology used. Thus, it is preferable to avoid reading any further characteristic from the phrase “automatic”, “telephone”, or “dialing” into the statutory definition. Doing so serves no purpose and there is no evidence Congress intended such when it defined the term ATDS.

The Commission should be aware of the extent that industry has responded in adapting to this criteria of “human intervention.” Requiring human intervention has resulted in some contact center operators and call center vendors deploying “clicker” applications which queue up calls for later origination. In one embodiment, a so-called “clicker” agent provide inputs to a dialer (where the inputs may be provided via a keyboard entry, mouse click, and/or even a foot pedal switch). Each input or click represents a manual intervention request for the dialer to *subsequently* originate a call. To be clear, in some cases a clicker agent will arrive an hour or so before the starting shift of the other agents. The clicker agent sits at a computer entering hundreds or thousands clicks as fast as they can during this time. They may literally repeatedly press the mouse button as fast as they can. The dialer stores each click as a request for a future call to originate. The number to be

dialed is not indicated when the clicker agent provides their input. Rather, the dialer determines the number to be dialed by selecting it from a list stored in the dialer. Thus, the number of clicks entered essentially defines how many numbers on the list of numbers will be dialed. Later during the day, as the other servicing agents report to work and log in, the dialer will automatically make a call to each sequential number on the list as the agents become available. This solution is a hybrid dialing mode that adapts to the “human intervention” requirement.⁵⁷ This highlights how industry has responded to a technological focused definition of an ATDS to meet the “human intervention” test.

If the Commission does incorporate any additional functions to augment the statutorily defined functions of an ATDS, it should clarify exactly the statutory authority for doing so, exactly how the definition of an ATDS is augmented, and how doing so serves the goals of the TCPA. There are some fundamental questions as to how “automatic” or the “human intervention” test would be exactly defined. For example, one way to incorporate the “automatic” aspect in the definition of an ATDS involves generating a random/sequential telephone number that is automatically dialed. This would result in narrowing the definition of an ATDS so that presumably it would be acceptable to have human intervention dialing random or sequentially generated numbers. If so, this results in the bizarre result that manually dialing emergency lines or wireless numbers using randomly generated numbers would be acceptable. That interpretation fails to address the problem of indiscriminate dialing that Congress intended to solve. Why would Congress prohibit automatic dialing of random wireless telephone numbers but allow such calls with human intervention? Clearly, the better interpretation would be any prohibit any type of indiscriminate calls from equipment using a random or sequential number generator to produce the telephone number dialed. In short, adding human intervention to the generation or dialing of numbers unduly narrows the equipment that was intended to be prohibited.

Another possible test applying “human intervention” is that it is a separate test of an ATDS. This presumes that “human intervention” is an *alternative* test to the statutorily defined definition

⁵⁷ One has to ask if using (instead) a mechanical device powered by an electrical motor that repeatedly presses the mouse button or keyboard in rapid succession would render this very same setup an ATDS for lack of human intervention, or whether a human turning on the motor of such a device would constitute sufficient human intervention to remove it from the scope of an ATDS.

of an ATDS. This test of the “human intervention” requirement is predicated on expanding the scope of an ATDS beyond the statutory definition. In other words, only if the scope of the ATDS is expanded beyond the statutorily defined functions is the “human intervention” aspect relevant as a separate test for an ATDS. For example, if equipment that processes a list is defined as an ATDS (thus disregarding the random/sequentially generated number requirement), then application of “human intervention” could be applicable. However, this is predicated on rewriting the statutory definition of an ATDS.

It may be tempting to incorporate a “human intervention” test into the Commission’s Order so as to regulate equipment that would otherwise not fall into the definition of an ATDS. Few, if any, of the more sophisticated modern day dialers (including predictive dialers) incorporate the statutorily defined functionality.⁵⁸ Thus, adopting a human intervention function is simply another method for the Commission to recapture that which has been lost due to the advancement of dialer technology and *ACA Int’l*. However, that, by itself, does not provide the authority for the Commission to rewrite the definition of an ATDS provided by Congress.

b. Other Functional Aspects Should Not be Incorporated into the Definition of an ATDS

The goals of the TCPA were in part to prevent invasions of privacy from unwanted telemarketing calls, unwanted pre-recorded message to residential lines, and indiscriminate dialing. The TCPA met these goals by defining provisions that established a do-not-call framework, prohibited artificial voice messages to residential lines, and prohibited using a random/sequential number generator for making calls to certain numbers. Attempting to expand the scope of regulation of an ATDS by focusing on technology used to create the call is unlikely to be fruitful. First of all, there is no statutory basis for expanding the definition of an ATDS. Assuming there were such a basis, the Commission should carefully consider what goal is being served when considering such modification to the scope of an ATDS.

⁵⁸ No doubt there are dialer “blasters” available in the market to indiscriminately dial a large number of calls, using a random or sequential number generator in order to delivery pre-recorded messages.

It is difficult to see how some of the functions identified in the Public Notice of an ATDS serve the policy goals of the TCPA. For example, the Commission seeks input on whether an ATDS is characterized by “dialing thousands of numbers in a short period of time.” It will always be arbitrary as to what constitutes a “short period of time” and how many calls are too many. Further, it is even unclear why the volume of calls, by itself, is even relevant. Some contact center operators employ over a thousand agents. Any attempt to limit the bounds of an ATDS based on this type of approach is guaranteed to result in industry adapting in a manner that renders the regulation useless or arbitrary. If the Commission were to prohibit a server capable of making, e.g., 1000 calls in 10 seconds, then contact center operators employing a thousand agents would respond by deploying four servers each capable of making 250 calls each. What policy would be served by forcing industry to adapt in this manner? In the past, requiring agents to manually dial a call instead of having a computer dial the call for the agent appears to be anchored on a policy of deliberately inducing higher costs and inefficiencies for contact center operators.

Further, other questions and ambiguities arise when incorporating such types of functional definitions in Commission regulations. Suppose that the equipment does have the present capability of making 1000 calls in 10 seconds, but it is only used to make 250 calls in 10 seconds? Does that mean that using such equipment, given it has a potential capacity to make 1000 calls in 10 seconds, make it an ATDS so that any call originated is prohibited? Again, what policy does this serve?

Some businesses originate a large number of calls to indicate package delivery notifications, prescription refill reminders, or data breach fraud notifications. Various businesses have hundreds of thousands of customers, and making a 1000 calls in a short time period may be a regular occurrence. Why should one type of equipment be considered an ATDS based on this characteristic whereas other equipment is not? From the perspective of a called party receiving a call, it is immaterial as to whether 999 other people received such calls. The called party is only concerned with the immediate call placed to them.

c. Combating “Robocalls” Does Not Require Adding Further Functions to the Definition of an ATDS

The Commission appears to have been motivated in the past to broaden the scope of an ATDS in order to address the “robocall problem.” Noble Systems (and others) have long advocated that use of the term “robocall” is not helpful to the discussion of an ATDS because of the many different interpretations of what is a “robocall.” The term has variously referred to as 1) a call playing a pre-recorded announcement, 2) a call made by an ATDS, 3) an unwanted informational call, 4) an unwanted legal telemarketing call, 5) an illegal telemarketing call, 6) a legal telemarketing call, or 7) an unwanted call of any type. By using an ambiguous word that has no fixed understanding, it makes it difficult to pin-down the exact problems being addressed.

Most of the truly problematic call types are covered by existing statutes/regulations. If the concern involves call originators originating scam calls, illegal telemarketing calls, or some other type of deceptive call, then other statutes are in place allowing the Commission to take action against such bad actors. This appears to be the largest percentage of complaints received by regulators.⁵⁹ Unwanted telemarketing calls are subject to the do-not-call regulations. And, a person whose number is listed in the Do-Not-Call database, does not want to receive illegal telemarketing calls regardless of the technology used to make the call. The recipient of an illegal telemarketing call does not care how the illegal telemarketing call was made. Attempting to regulate these types of calls based on the technology used has served to mainly ensnare legitimate contact center operators. In fact, the FCC has informed Congress that even in light of *ACA Int’l*, no further legal authorities are needed to address the challenge of illegal calls, as the Commission can act against illegal calls using the DNC and Truth-in-Caller-ID act.⁶⁰

The Commission and the industry are working towards technologies that promise to offer another tool that is effective in addressing illegal calls – namely SHAKEN/ STIR framework for

⁵⁹ See, e.g., page 38 of https://www.commerce.senate.gov/public/_cache/files/6461e17b-a761-45d8-9541-62eb934df0ca/3DE90E265AF3CEDF9C20C891F915C120.commission-testimony-re-abusive-robocalls-senate-04182018.pdf. The most common complaint to the FTC by topic in 2017 was debt reduction calls, where 771,158 calls were “robocalls” (pre-recorded announcements) and 90,100 involved a live caller.

⁶⁰ See, e.g., <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=E0EB17D2-A895-40B4-B385-F94EA2716957> at approximately 1:56:30. Ms. Harold, Chief of FCC enforcement, responded to a question from Senator Thune as to whether additional authorities were required by the FCC to combat robocalls and responded by stating: “We have to good grounds to do that. Almost all such robocallers use pre-recorded message, which is part of the TCPA and was not affected by the recent court decision. They also spoof, and that’s a complete different statute.”

attesting to the calling party number.⁶¹ That technology will allow another basis for carriers to block calls, analytics companies to label calls, and regulators to track & trace callers violating existing regulations. Based on the growth in illegal scam calls, it appears the ATDS definition has not proven effective in reducing scam calls and there is no reason to believe that “tweaking” a technology-focused definition of an ATDS will be more effective than in the past in reducing illegal calls.

d. Predictive Dialers Should Not Be A Motivating Reason for Adding Further Functions to the Definition of an ATDS

Predictive dialers are used to perform predictive dialing, which always involves connecting an agent to the called party. In any call center, there are a finite number of agents available, and agents are an expensive resource (i.e., they have to be paid). Predictive dialing is not used for playing prerecorded messages. In contrast, digital equipment that plays a prerecorded message is a resource typically only limited by only the number of connected calls that can exist over an interface from the dialer. Further, the digital resources that play the announcement are a relatively inexpensive resource. (i.e., they don’t have to be paid for their time). Hence, many illegal scams rely on dialing calls, playing an announcement to solicit a response, and transferring the call to an agent only if the called party responds in some manner.⁶²

Many businesses use predictive dialers to provide a higher level of customer support, and where human-to-human dialog is useful. It is useful to remember that telemarketing calls cannot be made to wireless numbers on the DNC list regardless of whether a predictive dialer or some manual dialing method is used. The called party on a DNC list receiving an illegal telemarketing call likely does not care whether the equipment originating the call had a present capacity or future capacity for certain functions. In such cases, the most effective regulation for the Commission to use are the DNC prohibitions.

⁶¹ Secure Telephony Identity Revisited and Signature-based Handling of Asserted Information using Tokens. . See Robocall Strike Force Report (Oct. 26, 2016) at 5 (available at <https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf>).

⁶² See footnote 52.

V. REASSIGNED NUMBER ISSUE

a) Scope of the Definition of “Called Party”

The Public Notice seeks comments on how calls to a reassigned number should be treated under the TCPA. Resolution of this issue is tied in part to the definition of the “called party,” and related to whether consent is required to use an ATDS when calling certain numbers. A call originator usually will not have 100% certainty that a number is currently associated with the intended or expected person to be reached. One solution would be for each call originator to query a reassigned number database service provider before making each call. However, such proposals may be expensive, potentially impractical, and may not be completely accurate. Further, such a solution is premised on the development of an extensive and expensive infrastructure.

Notwithstanding these issues associated with a reassigned number database, the Commission seeks input as to how the term “called party” should be interpreted with respect to calls to reassigned numbers. “Does the ‘called party’ refer to ‘the person the called expected to reach’? Or does it refer to the party the caller reasonably expected to reach, or does it refer to ‘the person actually reached (i.e., the wireless’ number’s present-day subscriber after reassignment?’”⁶³ Although not asked, a reasonable question is whether the “called party” could be something else.

At a high level, it is unclear what the distinction is intended between a person that is “expected to be reached” versus “reasonably expected to reach.” Assuming without deciding that “reasonably” is a more appropriate standard, the question can be rephrased as whether the preferred definition should be the “person reasonably expected to be reached” versus “the person actually reached (i.e., present day subscriber).”

Neither the TCPA language nor the Congressional reports leading to the passage of the TCPA discuss reassigned numbers. However, they do discuss aspects related to obtaining consent of the “called party” with respect to making calls. Analysis of these aspects support that Congress did not intend to narrowly interpret the phrase “called party” as the person actually being reached after dialing the call. Rather, it appears that Congress intended the “called party” was something

⁶³ Public Notice, p. 3.

broad, potentially even broader than the person intended to be called, reached, or who answers the call. Specifically, the “party” may refer to an organization, or any person associated with an organization.

To understand, a broader context of this issue is appropriate. Although the issue mainly arises in the context of reassigned wireless numbers, the prohibition was stated more generally in the TCPA as:

A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States....”⁶⁴

The list of prohibited categories includes:

- **types of lines** (“emergency telephone line”) associated with certain types of organizations (hospital, physician’s office, health care facility, poison control center, fire protection, law enforcement),
- **guest rooms** of a hospital, health care facility, elderly home, etc.
- **types of telephone numbers**, e.g., various wireless types of wireless services.

There is an inherent incongruity in the TCPA in that the prohibition of calling these specific destinations pertains to using an ATDS that dials indiscriminately. The ATDS dials telephone numbers that are randomly or sequentially generated, but regardless, that number has to be checked against a list of known destination types and consent conditions. In other words, even though an ATDS indiscriminately generates a number to be dialed, the number must then be checked to see

⁶⁴ 47 U.S.C. 227 (b)(1)(A).

whether that number is one of the enumerated types of prohibited categories. If the number is one of the types listed, then there must be either an emergency condition or previously obtained consent from that destination for the call to be placed.

The first prohibited category is based on emergency lines to various organizations and the second category is based on guest rooms of various types of facilities. It is unclear how a caller in 1991 could identify which lines in an organization, e.g., a police or fire station or some other facility, were designated as an “emergency line” as opposed to a non-emergency line. Not all telephone lines in a police or fire department are “emergency lines.” While the number could have been designated within the organization as an emergency line, how would it be known by the caller that the number was an emergency line of the organization? Similarly, in the second prohibited category (guest rooms), it is unclear how it a caller could know which telephone numbers associated with a health care facility would be associated with a guest/patient room as opposed to an administrative or business office of the health care facility. Such directory resources were not readily available that would provide such information to a caller.

With wireless numbers, it was easier to identify the number as being associated with a wireless service. In 1991, as is today, blocks of telephone numbers (typically a central office or exchange code) would be allocated to a wireless carrier to use, so that a wireless number could be readily identified before the call was placed. However, within that block of numbers, determining the subscriber of a wireless telephone number (so as to obtain their consent) would be difficult. Typically, the subscriber would be identified first to the caller, and then they would give their number and presumably, consent to the caller.

The above pertains to simply knowing initially what category a number is associated with. The issue of reassigned numbers focuses largely on wireless numbers, but equally applies to these other categories. For example, a hospital could reassign a telephone number from an administrative office to a guest room, or vice versa. Similarly, a city could allocate telephone numbers from one department to a police department. A caller would not readily know if the number had been reassigned in these cases. It appears Congress did not anticipate the reassignment of numbers from any of these categories, as they are not addressed in the statute or the legislative history.

The prohibition against calling these categories includes an exemption if consent is obtained from the “called party” for each of these cases. Consider what is involved in obtaining consent to call e.g., an emergency line of a police station, fire station, or hospital. That would involve getting consent from the police station, fire station, hospital, etc. In other words, this would require obtaining consent from the organization, not from the person answering the call. That is, a high-ranking official of the organization with the appropriate authority would be expected to provide such consent (assuming if it could be granted). In this case, the “called party” providing consent would be the organization. Likewise, obtaining the consent from a health-care facility to call into the rooms would likely involve obtaining consent from a representative of the organization, not necessarily the person answering the phone. In the case of wireless numbers, the “called party” providing the consent may be the subscriber of the service (e.g., cellular phone user, pager user, etc.), who may or may not be the person answering the cellular phone.

In the first two cases, the called party providing the consent is likely an organization. Further, the caller would likely view the call as being directed to the organization, as opposed to the person actually answering the call. (The caller may not even know which particular emergency personnel would be answering an emergency line of the organization.) Thus, the called party could be viewed in this case as the “organization” and the intended party reached could be any person associated with the organization.

In the case of the wireless numbers, the caller would likely obtain consent from a particular person who may be both the intended person reached as well as the actual person answering the call. But, there are many cases where the user of the cellular phone may not have been the subscriber, nor the person answering the phone. In 1991, cellular phones were comparatively expensive, large, and bulky. For example, an early form of a mobile phone was sometime referred to as a “bag phone” and may have been carried in a vehicle by utility workers for work purposes.⁶⁵ Or, a car phone may have been permanently installed in a vehicle for emergency personnel. For example, a utility crew or emergency responders may have carried a “bag phone” in their truck or emergency vehicle, and any crew working that shift using the vehicle may have answered the call. It would not be uncommon for the person answering the call to have been different from the

⁶⁵ See e.g., https://en.wikipedia.org/wiki/Motorola_Bag_Phone.

subscriber (i.e., the subscriber may have been a business entity). The called party may have been one of a set of individuals authorized to use that vehicle. In such cases, the caller may not have known the specific person actually answering the call.

The above suggests that in one instance (e.g., when calling a wireless number), the called party actually answering the call may have been, but not necessarily, the same person providing consent. Certainly, the “called party” in the first two instances (emergency lines and guest rooms) answering the phone may have been different from the person providing consent. Thus, interpreting ‘called party’ as the person actually answering the call is likely too narrow of a definition.

On the other hand, consider a broader definition of “called party.” In the case of calling an emergency line of an organization, the “called party” could be defined as the organization. That is, the caller knows the telephone number is the emergency line of a police station and that consent from the organization (e.g., the chief of police) has provided consent. Similarly, in the case of calling a guest room of a health care facility, if consent is provided from the facility, then the called party may be viewed as the facility, or alternatively, as a guest residing in that facility. In the case of calling a wireless numbers, then a specific person, set of persons, or any person associated with an organization may have been intended to be reached. For example, a bag phone installed in a utility truck could be answered by any of the current crew members, but the caller intended to reach whoever was presently operating that truck.

The point is that the rigidly defining that consent must be obtained from “called party” means the consent is obtained from the same individual person who actually answers the call is too narrow. The statute suggests a slightly more flexible definition of “called party” was contemplated, namely that the “called party” could be an organization, an expected individual, or some other person associated with the subscriber or organization.

In none of these cases did Congress evidence how to address the problem of a reassigned number. In 1991, the caller would not have been able to easily find out which telephone numbers were altered in their designation as an emergency line for a first responder organization, which numbers were reassigned from guest rooms to other purposes in a health care facility, or whether a wireless number was reassigned. Thus, the language of the statute suggests Congress favored a

broader definition of “called party”, one that was broader than the actual person answering a call. Given that a broader or more flexible interpretation was intended, this supports discarding the narrower interpretation.

Since the caller would not have any way of knowing whether an organization or wireless carrier re-categorized or reassigned a line or number, it seems appropriate to assume that Congress presumed the caller would be operating under their current understanding of how that telephone number was categorized and whether the consent previously obtained was valid. Until the caller learned of information otherwise, the caller could call these numbers using an ATDS as long as the two exceptions applied (the call was either an emergency call or consent was obtained). This supports adopting the interpretation that the called party is the intended party (whether a person or organization) expected to be reached.

A consequence of this is that the caller is essentially operating on their present understanding of whether the call is allowable. Absent actual notice of withdrawn of the consent, or reassignment of the number, the caller would presume they could call that number. This applies the same standard for the withdrawal of consent as to the reassignment of the number. A caller can originate a call with the consent of the called party, until the called party revokes consent. Similarly, the caller can originate a call to a type of line based on their current understanding. Thus, once the caller has notice of a change, then the caller should reasonably know that they should not originate calls. Similarly, once a caller that understands a line to a poison control center has been converted to an emergency line, the caller knows not to originate calls unless consent has been obtained.

b) The Issue May be Largely Mooted by the Definition of an ATDS

The need by callers to query a reassigned number database is motivated largely by the potential liability resulting from calling numbers using an ATDS. Narrowing the interpretation of an ATDS would likely result in many modern dialers not being classified as an ATDS (because many do not have nor use a random/sequential number generator for originating calls to those numbers). Thus, if dialers are not classified as an ATDS, then contact center operators would likely see little benefit justifying the cost of querying a reassigned number database.

This raises a potential concern that wireless called parties may receive repeated, unwanted calls by callers repeatedly dialing a reassigned number using a non-ATDS device. In the past, some contact center operators used manual dialing techniques to call wireless numbers, such that the equipment was not considered an ATDS. Thus, the concern for wireless caller parties receiving unwanted manually dialed calls is not a new concern. Such calls were not prohibited under the ATDS prohibitions of the TCPA (but the DNC provisions may have applied).

c) This is Not a Problem Without a Solution

To the extent that wireless called parties receive unwanted calls to their cell phones from non-ATDS devices, this is not a problem without a solution. Since the Commission authorized call blocking in its 2015 Order,⁶⁶ there has been rapid development by the industry to provide call blocking and call labeling solutions. Cellular phone users have a number of available tools, including mobile applications and various service provider services, to block unwanted calls or provide call labeling information that better allows callers to screen calls. Callers using predictive dialers to repeatedly dial wireless numbers will very quickly find their calls ineffective. Further, with the deployment of technology such as Shaken and Stir, such callers will be readily identifiable, and will have a motivation to cease unwanted or abusive calls.

d) Revocation of Consent

The standard for a called party to revoke their consent is that “a party may revoke their consent through any reasonable means.”⁶⁷ While this is laudable in attempting to be consumer friendly, providing greater flexibility has not always made it easier for the consumer. Yes, a caller may offer various ways to revoke consent. But in practice, what is the value of offering e.g., an email as a channel for accepting such requests if the email address is not readily known to the public? What is the value offering voice, email, fax, or postal mail channels for revoking consent, if the sender of a text does not recognize a text-based approach (e.g., the ability to recognize a reply “stop” message)? The Commission should consider mandating that callers offer certain minimum methods to receive a revocation request. Some example proposals include:

⁶⁶ Declaratory Ruling and Order, FCC 15-72, released July 10, 2015.

⁶⁷ Public Notice, p. 4; *ACA Int'l*, p. 41.

- A sender of a text must accept a “stop” reply (or a set of other defined words) to revoke consent.
- A sender of pre-recorded voice messages on an outbound voice call must accept at least:
 - a) a dual-tone multiple frequency code (“DTMF”) entered during the playing of the message as revocation of consent, and
 - b) a callback directed to the same calling party number used for that outbound call, which the called party may call to revoke consent. The callback call must reach an agent or an IVR that can process the revocation of consent.
- Any agent speaking to the called party should be recognize a verbal revocation request.

The Commission should consider mandating a minimum of methods (which are not necessarily those identified above) facilitate a called party revoking consent or otherwise requesting cessation of receiving such calls. Callers should be mandated to publish such channels on a website, assuming they have a website for their business. These mandatory methods do not foreclose callers from employing other methods. The goal is that callers should know that for certain types of channels or call types, there is a known mandated method of indicating their revocation of consent.

Once these mechanisms are deployed, it is likely that callers will honor such requests, even when it may not be required from a regulatory perspective. For example, an enterprise may be sending texts to called parties using an ATDS, and hence is required to recognize “stop” as a method of revocation of consent. The enterprise may also be sending texts to called parties using equipment that is not considered an ATDS, and may find it appropriate to also recognize a “stop” request to cease sending texts.

The Commission should recognize that the TCPA does not grant it unlimited authority to regulate all types of calls by an enterprise. Calls where an ATDS is not used, nor where an announcement is not played, nor are directed to numbers on the DNC list, are not within the scope of the TCPA. At the moment, evidence suggest such cases are not a significant percentage of the

complaints to the Commission relative to other types of illegal calls.⁶⁸ In such cases, the called party can simply enlist a call blocking/labeling service available from their service provider to block or screen calls. Thus, while there may not regulatory prohibitions for originating such types of unwanted calls, there are industry solutions available. Legitimate businesses will update their calling lists once they receive actual notice that the party they are intending to reach is no longer at that number.

VI. CONCLUSION

The Commission should adopt a strict statutory based interpretation of an ATDS as defined in the TCPA. This means that equipment considered an ATDS must have the functions of a random or sequential number generator to generate a telephone number and the ability to dial that number. No further functions or requirements should be incorporated into the definition. Further, only calls originating from equipment where these functions were used should be considered as using an ATDS.

As for the interpretation of “called party” in the context of reassigned numbers, the statute supports adopting a broader interpretation than “the person actually reached.” The scope of the term “called party” appears broader, and encompasses other situations, such as a person associated with an organization. Thus, as between the choice “person actually reached” and “party the caller reasonably expected to reach,” the latter is preferred. This has the result that a standard of ‘actual notice’ should be applied for number reassignment, where liability accrues to the caller for using an ATDS only once the caller is informed of the reassignment.

The Commission should mandate that callers using an ATDS as well as a prerecorded announcement offer certain methods of revocation of request. For ATDS text calls, this could be recognizing a “stop” at a minimum. For ATDS voice calls, it could be honoring a request conveyed to an agent or entry of a standardized DTMF tone. For prerecorded announcements, it could be entry of a standardized DTMF tone or a voice callback to the calling party number used on the

⁶⁸ See, e.g., referenced report by the FTC listing the type of calls it has received complaints for. https://www.commerce.senate.gov/public/_cache/files/6461e17b-a761-45d8-9541-62eb934df0ca/3DE90E265AF3CEDF9C20C891F915C120.commission-testimony-re-abusive-robocalls-senate-04182018.pdf.

prerecorded call. The Commission can then monitor whether such mechanisms would be utilized by the industry for acting on requests from called parties to cease calls from non ATDS devices.

While a result of adopting these recommendation means there may be some calls which are not regulated by the Commission (just as there were prior to *ACA Int'l*), the development of various call blocking and call screening solutions may mitigate such unwanted, but legal calls. The ability of the Commission to address illegal callers is not hampered by narrowing the definition of an ATDS.

Respectfully submitted on June 13, 2018,
/Karl Koster/
Karl Koster,
Chief IP and Regulatory Counsel
Noble Systems Corporation
1200 Ashwood Parkway
Atlanta, GA 30338
(404) 851-1331 (x1397)

VII. APPENDICES

Attached are copies of Senate Report 102-178 and House Report 102-317.

S. REP. 102-178, S. Rep. No. 178, 102ND Cong., 1ST Sess. 1991, 1991 U.S.C.C.A.N. 1968, 1991 WL 211220 (Leg.Hist.)

****1 *1968 [P.L. 102-243](#), TELEPHONE CONSUMER PROTECTION ACT OF 1991**

AUTOMATED TELEPHONE CONSUMER PROTECTION ACT

DATES OF CONSIDERATION AND PASSAGE

Senate: November 7, 27, 1991
House: November 18, 26, 1991
Senate Report (Commerce, Science, and Transportation Committee) No. 102-178,
Oct. 8, 1991 (To accompany S. 1462)
House Report (Energy and Commerce Committee) No. 102-317,
Nov. 15, 1991 (To accompany H.R. 1304)
Cong. Record Vol. 137 (1991)

RELATED REPORTS

Senate Report (Commerce, Science, and Transportation Committee) No. 102-177,
Oct. 8, 1991 (To accompany S. 1410)

SENATE REPORT NO. 102-178
October 8, 1991
[To accompany S. 1462]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1462) to amend the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment for advertising and solicitation purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers.

***1969 BACKGROUND AND NEEDS**

A. CONSUMER COMPLAINTS

The use of automated equipment to engage in telemarketing is generating an increasing number of consumer complaints. The Federal Communications Commission (FCC) received over 2,300 complaints about telemarketing calls over the past year. The Federal Trade Commission, State regulatory agencies, local telephone companies, and congressional offices also have received substantial numbers of complaints.

Consumers are especially frustrated because there appears to be no way to prevent these calls. The telephone companies usually do not know when their lines are being used for telemarketing purposes, and, even if they did, it is questionable whether the telephone companies should be given the responsibility of preventing such calls by monitoring conversations. Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially.

In general, those who complain about these calls believe that they are a nuisance and an invasion of privacy. Residential and business subscribers believe that these calls are an impediment to interstate commerce. In particular, they cite the following problems:

- automated calls are placed to lines reserved for emergency purposes, such as hospitals and fire and police stations;
- the entity placing the automated call does not identify itself;
- the automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages;
- the automated calls will not disconnect the line for a long time after the called party hangs up the phone, thereby preventing the called party from placing his or her own calls;
- automated calls do not respond to human voice commands to disconnect the phone, especially in times of emergency;
- some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls; and
- unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging customers must pay to return the call to the person who originated the call).

B. REASONS FOR THE CONSUMER COMPLAINTS

****2** The growth of consumer complaints about these calls has two sources: the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective.

The telemarketing industry is growing by immense proportions and is now a multibillion dollar industry. Some estimates are that ***1970** the telemarketing industry gathered \$435 billion in sales in 1990, a more than fourfold increase since 1984.

Recent changes in the telemarketing industry have made making unsolicited phone calls a more cost-effective method of reaching potential customers. Over the past few years, long distance telephone rates have fallen over 40 percent, thereby reducing the costs of engaging in long distance telemarketing. The costs of telemarketing have fallen even more with the advent of automatic dialer recorded message players (ADRMPs) or automatic dialing and announcing devices (ADADs). These machines automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message. Certain data indicate that the machines are used by more than 180,000 solicitors to call more than 7 million Americans every day. Each ADRMP has the capacity to dial as many of 1,000 telephone numbers each day.

C. THE NEED FOR LEGISLATION

Many consumers and consumer representatives believe that legislation is necessary to protect them from these calls. One survey found that about 75 percent of persons contacted favored some form of regulation of these calls, and one-half of these favored prohibiting all unsolicited calls.

As a result, over 40 States have enacted legislation limiting the use of ADRMPs or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.

The FCC, however, has decided not to take any action to regulate unsolicited calls. After examining this issue in 1980 and 1986, the FCC concluded that it did not need to take any action.¹ In its statement submitted to the Communications Subcommittee for the record of the hearing on this bill, FCC Chairman Alfred C. Sikes stated: "It is not

clear, however, that sweeping Federal legislation is required. *** [T]his may be a situation where continued regulatory scrutiny and monitoring, subject to congressional review and oversight, is preferable to passage of legislation.”²

D. THE LEGISLATION

In response to these increasing consumer complaints and calls for Federal legislation, Senator Hollings introduced S. 1462, the “Automated Telephone Consumer Protection Act,” on July 11, 1991. The bill as introduced proposed to ban artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on unsolicited advertisements delivered via fax machine. The bill received the strong support of consumer groups and many telephone customers.

E. RESPONSE TO THE TELEMARKETERS

****3** Telemarketers generally believe that Federal legislation is unnecessary; they believe that the tremendous growth in the telemarketing***1971** industry is evidence that many consumers benefit from these calls. The Direct Marketing Association and other groups representing companies that engage in telemarketing, however, do not oppose the restrictions contained in S. 1462 as reported. These companies do not use automatic dialers or other equipment to make automated telephone calls and thus do not object to the reported bill. They also do not object to banning telemarketing calls to emergency and mobile services numbers.

Some telemarketers asked that S. 1462 be amended to exempt the following automated calls: automated calls made by companies to tell people who have ordered products that the item is ready for pickup; automated calls made for debt collection purposes; and automated calls that ask a customer to “Please hold. An operator will be with you shortly.”

These exemptions are not included in the bill, as reported. The Committee believes that such automated calls only should be permitted if the called party gives his or her consent to the use of these machines. In response to these concerns, however, the reported bill does not include the requirement included in the bill as introduced the requirement that any consent to receiving an automated call be in writing. The bill as reported thus will allow automated calls to be sent as long as the called party gives his or her prior express consent either orally or in writing.

F. CONSTITUTIONAL CONCERNS

Some people have raised questions about whether S. 1462 is consistent with the First Amendment protections of freedom of speech. The Committee believes that S. 1462 is an example of a reasonable time, place, and manner restriction on speech, which is constitutional. The reported bill, does not discriminate based on the content of the message. It applies equally whether the automated message is made for commercial, political, charitable or other purposes. The reported bill regulates the manner (that is, the use of an artificial or prerecorded voice) of speech and the place (the home) where the speech is received.

The Supreme Court has recognized the legitimacy of reasonable time, place, and manner restrictions on speech when the restrictions are not based on the content of the message being conveyed. In 1948, the Court upheld an ordinance banning sound trucks. [Kovacs v. Cooper, 336 U.S. 77 \(1948\)](#). The Supreme Court also has recognized that “in the privacy of the home***the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.” [FCC v. Pacifica Found., 438 U.S. 726, 748 \(1978\)](#). The case upheld an FCC ruling that prohibited the daytime broadcast of indecent language.

***1972** In addition, it is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by “live” persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party,³ fill an answering machine tape or a voice recording service,⁴ and do not disconnect the line even after the customer hangs up the telephone.⁵ For all these reasons, it is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by “live” persons.

G. CHANGES TO THE BILL AS INTRODUCED

****4** In response to the comments received by the Committee, the version of S.1462 reported by the Committee includes three changes to the bill as introduced. These changes are as follows:

- a. The reported bill deletes the ban on sending faxes to emergency phones or cellular phones. Some persons have fax machines in their cars and may want to receive fax messages. Further, there may be times when an emergency situation requires the use of a fax message.
- b. The reported bill deletes the requirement that all consent must be in writing. Many persons order goods over the phone and may give their oral consent to being called back by a computer telling them that their product is ready for pickup. The reported bill allows the consent to be given either orally or in writing.
- c. The bill as introduced banned automated telephone calls unless the call was placed by a "public school or other governmental entity." The reported bill replaces this language with an exception for "any emergency purposes." This will allow the use of automated calls when private individuals as well as schools and other government entities call for emergency purposes.

H. CONCLUSION

The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can ***1973** be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services. Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who use these machines to place interstate telephone calls. The Federal Government has a legitimate interest in protecting the public, and the regulations required by the reported bill are the minimum necessary to protect the public against the harm caused by the use of these machines. These regulations are consistent with the constitutional guarantee of free speech.

LEGISLATIVE HISTORY

Senator Hollings introduced S. 1462 on July 11, 1991, which is cosponsored by Senators Inouye, Stevens, Bentsen, and Simon. The Communications Subcommittee held a hearing on S. 1462 and S. 1410, the Telephone Advertising Consumer Rights Act, on July 24, 1991. Witnesses included representatives of consumer organizations, the Direct Marketing Association, and the mobile telephone services industry. On July 30, 1991, in open executive session, the Committee ordered S. 1462 reported, with an amendment in the nature of a substitute, without objection.

The House of Representatives also has been considering telemarketing legislation. The House Telecommunications and Finance Subcommittee favorably reported H.R. 1304, the Telephone Advertising Consumer Rights Act, on May 9, 1991, and the House Energy and Commerce Committee favorably reported a modified version of H.R. 1304 on July 30, 1991. This House bill contains restrictions on calls to emergency lines and unsolicited advertising by fax machine that are similar to the restrictions contained in S. 1462, as reported. Congresswoman Unsoeld (D-WA) has introduced legislation in the House (H.R. 1589) to ban the use of autodialers. No action on this bill has yet been taken.

****5** In the 101st Congress, the House passed a bill (H.R. 2921), similar to the bill it is currently considering but that bill was not passed by the Senate before adjourned.

***1974** SUMMARY OF MAJOR PROVISIONS

The bill would accomplish the following:

1. Emergency and Cellular lines: ban all autodialed calls, and artificial or prerecorded calls, to emergency lines and paging and cellular phones.
2. Computerized calls to homes: ban all computerized calls to the home, unless the called party consents to receiving them, or unless the calls are made for emergency purposes (the ban applies whether the automated call is made for commercial, political, religious, charitable or other purposes).

3. Junk Fax: ban all unsolicited advertisements sent by fax machine, unless the receiver invites or gives permission to receive such advertisements.

4. Technical and Procedural Requirements:

a. Autodialers: Autodialers must identify the initiator of the call, must give the telephone number of the business placing the call, and must disconnect the line within 5 seconds of receiving notice that the called party has hung up the telephone; and

b. Fax machines: Fax machines must identify the sender on each page or the first page of each transmission, and give the telephone number of the sending machine.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 9, 1991.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1462, the Automated Telephone Consumer Protection Act, as ordered reported by the Senate Committee on Commerce, Science, and transportation on July 30, 1991. CBO estimates that enactment of this bill would result in increased costs to the federal government of \$750,000 over the next five years. Enactment of S. 1462 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

S. 1462 would ban all prerecorded or automatically-dialed telephone calls to emergency, paging, or cellular telephone numbers and to residential subscribers without the express prior consent of the called party. The bill also would ban unsolicited facsimile advertisements. Finally, S. 1462 would require the Federal Communications Commission (FCC) to revise standards for facsimile and autodialing machines to require that they provide certain information about the sender.

***1975** Based on information from the FCC, CBO estimates that development, implementation, and enforcement of the various bans and standards required by the bill would result in increased costs to the federal government of \$750,000 over the next five years.

****6** No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John Webb, who can be reached at 226-2860.

Sincerely,

Robert D. Reischauer, Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS COVERED

This bill, as reported imposes a limited regulatory burden on some equipment manufacturers and some telemarketers. As a result of this legislation, telemarketers must obtain the express consent of any residential telephone subscriber before placing an automated telephone call to that subscriber (unless the call is made for emergency purposes.) Most telemarketers that have contacted the Committee do not use these machines to place automated telephone calls to consumers' homes. If they do use these machines, such consent can be obtained at the beginning of a

telephone call by a “live” person. For instance, when a consumer answers the phone, a “live” person can ask the consumer if he or she consents to listening to a recorded or computerized message. If the consumer indicates express consent, the “live” caller may switch to a recorded or computerized message. The Committee does not believe that this consent requirement will be an inordinate regulatory burden on the telemarketer.

Telemarketers also will be required to ensure that they do not place automated calls to residential customers, to emergency lines, or to cellular or paging numbers. These restrictions are necessary to accomplish the objectives of the bill. The bill, as reported, does not bar telemarketers from placing automated calls to business users.

Also, the reported bill prohibits telemarketers from sending unsolicited advertisements via a fax machine. Under the definition of “unsolicited advertisement” contained in the bill, the recipient either must invite or must give his or her permission to receive an advertisement via a fax machine. In other words, as long as the recipient of a fax either invites or grants permission, telemarketers may continue to send such fax messages. While telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages, such a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that *1976 are detrimental to the owner's uses of his or her fax machine. Such restrictions do not apply to fax messages that are not “advertisements.”

Finally, the bill imposes some minimal technical requirements on all fax machines to include the name, address, and telephone number of the person sending any fax message. In addition, automated telephone equipment manufacturers must ensure that their equipment disconnects the called party's line within 5 seconds of the time the equipment is notified that the called party has hung up the telephone. These requirements may impose a minimal burden on the manufacturers of such machines, although most machines already comply with these requirements. The Committee has received no objections to these requirements.

**7 These minimal burdens must be compared to the great number of people who will benefit from the protection of these regulations. As noted previously, it is estimated that these machines are used to call as many as 7 million Americans every day.

ECONOMIC IMPACT

The reported bill may have a minimal economic impact on the telemarketing industry. The bill prohibits telemarketers from using artificial or prerecorded voice messages to residential consumers without the prior express consent of the recipient of the call. As noted previously, however, most telemarketers do not place unsolicited telephone calls to residential customers using artificial or prerecorded messages. Further, this legislation continues to permit telemarketers to contact potential customers using “live” persons to place telephone calls, to call business customers through artificial or prerecorded voice messages, or to engage in any other method of advertising. The fact that the major telemarketers do not oppose this legislation further reflect the view that the potential economic impact on telemarketers, if any, will be small.

PRIVACY

The reported bill will result in a significant benefit in protecting the personal privacy of residential telephone subscribers. The evidence gathered by the Committee indicates that a substantial proportion of the public believes that these calls are a nuisance and an invasion of one's privacy rights in the home. The Supreme Court has recognized explicitly that the right to privacy is founded in the Constitution, and telemarketers who place telephone calls to the home can be considered “intruders” upon that privacy.

PAPERWORK

The reported bill adds a new section to the Communications Act of 1934, and it requires the FCC to revise its technical and procedural standards for fax machines and automated telephone equipment. These technical and procedural standards already exist in the industry; the FCC need only accept these standards, which already have been developed by the industry. The FCC also may initiate*1977 a rulemaking proceeding to develop regulations to enforce the provisions of this bill. Such rulemaking proceedings are unlikely to require a great deal of paperwork be-

cause of the relatively straight-forward nature of the restrictions contained in this bill. The reported bill imposes no additional reporting requirements on any of the parties affected by the legislation. The paperwork burden on the FCC and on any parties affected by this bill thus will be minimal.

SECTION-BY-SECTION ANALYSIS

SECTION 1—SHORT TITLE

This section states that the bill's short title is the “Automated Telephone Consumer Protection Act.”

SECTION 2—RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT

Subsection (a) adds a new section 228 to the Communications Act of 1934 establishing regulations concerning automatic dialing devices, fax machines, artificial or prerecorded voice messages, or other similar devices. The regulations concerning the use of these machines apply to the persons initiating the telephone call or sending the message and do not apply to the common carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message.

****8** Subsection (a) of new section 228 sets forth definitions of an “automatic telephone dialing system,” a “telephone facsimile machine” and an “unsolicited advertisement.”

New section 228(b)(1) prohibits any call using any automated telephone dialing system, or an artificial or prerecorded voice, to emergency, paging, or cellular telephone lines.

New section 228(b)(2) prohibits any call to a residence using an artificial or prerecorded voice message without the prior, express, oral or written consent of the called party, unless the call is initiated for emergency purposes. The FCC shall define what constitutes an “emergency.” In general, any threat to the health or safety of the persons in a residence should be considered an emergency. In adopting a definition of this term, the FCC should consider whether disconnecting telephone service would constitute an emergency. If so, telephone companies would be permitted to use an artificial or prerecorded voice message to alert their customers that their telephone service was about to be disconnected unless payment of the outstanding balance was received.

New section 228(b)(3) prohibits sending unsolicited advertisements by a fax machine.

New section 228(c)(1)(A) prohibits the sending of a communication by a fax machine or automatic telephone dialing system that does not comply with technical standards prescribed under new section 228(c).

New section 228(c)(1)(B) requires that any message sent by a computer or other electronic device via fax machine must identify the ***1978** date, time, company's name, and phone number in the margin of every page, or on the first page.

New section 228(c)(2) requires the FCC to set technical standards so that all fax machines which are manufactured after 6 months after the date of enactment of this section and which can be used for unsolicited advertising have the capability of making such identification of the sender of the message. The FCC shall exempt from such standards, for 18 months, those fax machines that cannot engage in automatic dialing and transmission and that cannot operate with a computer.

New section 228(c)(3) requires the FCC to set technical standards for systems sending artificial or prerecorded voice messages via telephone. New section 228(c)(3)(A) requires all artificial or prerecorded telephone messages to identify the business initiating the call and to state the telephone number or address of such business.

New section 228(c)(3)(B) requires any artificial or prerecorded voice system to release the called party's line within 5 seconds of receiving notification that the called party has hung up. This provision does not require such equipment to disconnect within 5 seconds of the time called party actually hangs up; it requires disconnection within 5 seconds of the time it is notified by the telephone network that the called party has hung up. This clarification is included in recognition that some telephone companies are not able to notify the calling party that the called party has hung up for several seconds. It is thus unrealistic to expect such equipment to disconnect the line before it recognizes that the called party actually has hung up the telephone.

****9** New section 228(d) states that nothing in this legislation preempts more restrictive State action regarding the use of fax machines, automatic telephone dialing systems, and artificial or prerecorded voice messages.

Subsection (b) of the reported bill is a conforming amendment.

***0 CHANGES IN EXISTING LAW**

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

Section 2 of that Act

APPLICATION OF ACT

Sec. 2. (a) ***

(b) Except as provided in section 223 or sections 224 [and 225], 225, and 228 and subject to the provisions of section 301 and Title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

Title II of that Act

TITLE II—COMMON CARRIERS

Secs. 201 through 227 ***

Sec. 228. Restrictions on the Use of Automated Telephone Equipment.—(a) Definitions.—As used in this section—

(1) The term “automatic telephone dialing system” means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term “telephone facsimile machine” means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line.

(3) The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

****10 (b) Restrictions.—It shall be unlawful for any person within the United States—**

(1) to make any call using any automatic telephone dialing system or an artificial or prerecorded voice—

(A) to any emergency telephone line of any hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency; or

(B) to any telephone number assigned to paging or cellular telephone service;

(2) to initiate any telephone call to any residence using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes; or

(3) to send an unsolicited advertisement by a facsimile machine.

(c) Technical and Procedural Standards.—

(1) Prohibition.—It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system (to make any telephone solicitation) in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business sending the message and the telephone number of the sending machine or of such business.

(2) Telephone facsimile machines.—The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which—

(A) is manufactured after 6 months after the date of enactment of this section, and

(B) can be used for the distribution of unsolicited advertising,

clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business sending the message, and the telephone number of the sending machine or of such business. The Commission shall exempt from such standards, for 18 months after such date of enactment, telephone facsimile machines that do not have the capacity for automatic dialing and transmission and that are not capable of operation through an interface with a computer.

(3) Artificial or prerecorded voice systems.—The Commissioner shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business; and

****11** (B) any such system will automatically release the called party's line within 5 seconds of the time the system receives notification that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(d) State Law Not Preempted.—Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(1) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(2) the use of automatic telephone dialing systems to transmit prerecorded telephone solicitations; or

(3) the use of artificial or prerecorded voice messages.

1 See, e.g., [Unsolicited Telephone Calls, 77 FCC 2d 1023 \(1980\)](#); Automatic Dialing Devices, FCC Release No. 86-352 (1986).

2 Statement of Alfred C. Sikes, Chairman, FCC, before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, on S. 1410, S. 1462, and S. 857, July 24, 1991, pp. 1–2.

3 For instance, Mr. Steve Hamm, Administrator of the South Carolina Department of Consumer Affairs, testified that “[O]ne of the constant refrains that I hear *** from consumers and business leaders who have gotten these kinds of computerized calls is they wish they had the ability to slam the telephone down on a live human being so that that organization would actually understand how angry and frustrated these kinds of calls make citizens, and slamming a phone down on a computer just does not have the same sense of release.” Communications Subcommittee Hearing on S. 1410, S. 1462, and S. 857, July 24, 1991. Hearing Transcript, p. 22.

4 When machines call a person using an answering machine, the automated call can fill the entire tape of the answering machine, thereby preventing the called party from receiving other messages from other callers. When a person uses a voice recording system from the telephone company, the person often is required to pay for every mes-

sage that is recorded. The amount of the payment often varies depending on the length of the call. When “live” persons place these telemarketing calls, they usually hang up soon after realizing that the called party is not personally available, thus minimizing payment.

5 The disconnection problem is especially important and is one of the principal reasons why automated calls are more of a nuisance than calls placed by “live” persons. Automated calls often do not disconnect the line after the called party hangs up, thereby preventing the called party from being able to use his or her line to make outgoing calls. Testimony before the Committee and press accounts have given numerous examples of persons who tried to place a call for emergency purposes and who could not use their phones because the phones were tied up by an automated machine that failed to recognize that the called party had hung up the phone.

This problem is not solved completely by the requirement in S. 1462 that these machines disconnect the line within five seconds of the time that the telephone network notifies the machines that the called party has hung up. When a called party hangs up on a “live” person, the “live” person can hear the called party hang up and can disconnect the line immediately. A machine, however, does not hear the called party hang up the phone. The machine must await a disconnect signal transmitted by the telephone network. The testimony of the FCC indicates that it can take up to 32 seconds for the telephone network to generate this signal so that the machine knows to disconnect its end of the line. Thus, even if the machines are required to disconnect within five seconds of being notified that the called party has hung up, the called party's line can remain tied up for up to 37 seconds after he or she hangs up the phone.

S. REP. 102-178, S. Rep. No. 178, 102ND Cong., 1ST Sess. 1991, 1991 U.S.C.C.A.N. 1968, 1991 WL 211220 (Leg.Hist.)

END OF DOCUMENT

TELEPHONE ADVERTISING CONSUMER RIGHTS ACT

NOVEMBER 15, 1991.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DINGELL, from the Committee on Energy and Commerce,
submitted the following

REPORT

[To accompany H.R. 1304]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 1304) to amend the Communications Act of 1934 to regulate the use of telephones in making commercial solicitations, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
The Amendment.....	2
Purpose and Summary.....	5
Background and Need for Legislation	6
Telephone Solicitation Issues.....	7
The Modern Telemarketing Industry	7
Telephone Company Studies	8
Increase in Unlisted Numbers	9
State Laws—Legislation	9
Automatic Dialing Systems.....	10
Facsimile Advertising.....	10
Hearings	11
Committee Consideration	11
Committee Oversight Findings.....	11
Committee on Government Operations.....	11
Committee Cost Estimate.....	11
Congressional Budget Office Estimate.....	11
Inflationary Impact Statement	12
Section-by-Section Analysis and Discussion.....	12
Section 1. Short Title.....	12
Section 2. Findings.....	12
Section 3. Amendments to the Communications Act of 1934	12
Definition of Telephone Solicitation	13
Exemption of Established Business Relationships	13

Exclusion of Calls from Tax Exempt Organizations	16
Protection of Subscriber Privacy Rights	18
Consumer Complaints	18
Possible Remedies—Limitations	19
Development of the Electronic Database Alternative	20
Database Cost Assumptions	21
Database Cost Estimates	22
Additional Clarifications	23
Changes in Existing Law Made by the Bill, as Reported	26

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telephone Advertising Consumer Rights Act".

SEC. 2. FINDINGS.

The Congress finds that:

- (1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.
- (2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.
- (3) More than 300,000 solicitors call more than 18,000,000 Americans every day.
- (4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.
- (5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
- (6) Many consumers are outraged the proliferation of intrusive, nuisance calls to their homes from telemarketers.
- (7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.
- (8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.
- (9) Individuals privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

Title II of the Communications Act of 1934 is amended by inserting immediately after section 226 (47 U.S.C. 226) the following new section:

"SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

"(a) DEFINITIONS.—As used in this section:

"(1) The term 'automatic telephone dialing system' means equipment which has the capacity—

"(A) to store or produce telephone numbers to be called, using a random or sequential number generator;

"(B) to dial such numbers; and

"(C) to deliver, without initial live operator assistance, a prerecorded voice message to the number dialed, with or without manual assistance.

"(2) The term 'telephone facsimile machine' means equipment which has the capacity to do either or both of the following: (A) to transcribe text or images (or both) from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

"(3) The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person (A) without that person's prior express invitation or permission, or (B) with whom the caller does not have an established business relationship. Such term does not include a call or message by a tax exempt nonprofit organization.

"(4) The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is

transmitted to any person (A) without that person's prior express invitation or permission, or (B) with whom the caller does not have an established business relationship.

"(b) RESTRICTIONS.—It shall be unlawful for any person within the United States by means of telephone—

"(1) to make any telephone solicitation in violation of the regulations prescribed by the Commission pursuant to subsection (c);

"(2) to use, to make any telephone solicitation, any telephone facsimile machine or any automatic telephone dialing system that does not comply with the technical and procedural standards prescribed under subsection (d), or to use, to make any telephone solicitation, any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards;

"(3) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement in violation of any regulations prescribed by the Commission pursuant to subsection (e);

"(4) to use any automatic telephone dialing system to make unsolicited calls—

"(A) to any emergency telephone line or pager of any hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency; or

"(B) to any telephone number assigned to paging, specialized mobile radio, or cellular telephone service; or

"(5) to use a computer or other electronic device to send an unsolicited advertisement via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the advertisement or on the first page of each transmission, the date and time it is sent, an identification of the business sending the advertisement, and the telephone number of the sending machine or of such business.

"(c) PROTECTION OF SUBSCRIBER PRIVACY RIGHTS.—

"(1) RULEMAKING PROCEEDING REQUIRED.—Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

"(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

"(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

"(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

"(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

"(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

"(2) REGULATIONS.—Not later than 240 days after the date of enactment of this section, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

"(3) USE OF DATABASE PERMITTED.—The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, or to receiving certain classes or categories of telephone solicitations, and to make that compiled list available for purchase. If the Commission determines to require such a database, such regulations shall—

"(A) specify a method by which the Commission will select an entity to administer such database;

"(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

"(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

"(D) specify the methods by which such objections shall be collected and added to the database;

"(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

"(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

"(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

"(H) specify the methods for recovering, from persons accessing such database, the costs involved in notifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

"(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with subsection (b);

"(J) be designed to enable and require States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

"(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

"(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

"(4) Considerations required for use of database method.—If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

"(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

"(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

"(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

"(ii) reflect the relative costs of providing such lists on paper or electronic media; and

"(iii) not place an unreasonable financial burden on small businesses; and

"(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

"(d) TECHNICAL AND PROCEDURAL STANDARDS.—

"(1) TELEPHONE FACSIMILE MACHINES.—The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after 6 months after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business or other entity sending the advertisement, and the telephone number of the sending machine or of such business. The Commission shall exempt from such standards, for 12 months

after such date of enactment, telephone facsimile machines that do not have the capacity for automatic dialing and transmission and that are not capable of operation through an interface with a computer.

"(2) AUTOMATIC TELEPHONE DIALING SYSTEMS.—The Commission shall prescribe technical and procedural standards for automatic telephone dialing systems that are used to transmit any prerecorded telephone solicitation. Such standards shall require that—

"(A) all prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business or other entity; and

"(B) such systems will, as soon as is technically practicable (given the limitations of the telephone exchange service facilities) after the called party hangs up, automatically create a disconnect signal or on-hook condition which allows the called party's line to be released.

"(e) CONSIDERATION OF FACSIMILE MACHINE RESTRICTIONS.—Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding to prescribe rules to restrict the use of any telephone facsimile machine or computer or other electronic device to send any unsolicited advertisement to the telephone facsimile machine of any person. In establishing such restrictions, the Commission shall consider—

"(1) the extent to which unsolicited advertisements are transmitted through telephone facsimile machines;

"(2) the extent to which recipients of such advertisements incur costs for such receipt; and

"(3) the most cost effective methods of preventing advertising abuses with telephone facsimile machines.

"(f) EFFECT ON STATE LAW.—

"(1) STATE LAW NOT PREEMPTED.—Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits, either or both of the following:

"(A) The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements.

"(B) The use of automatic telephone dialing systems to transmit prerecorded telephone solicitations.

"(2) STATE REGULATION OF TELEPHONE SOLICITATIONS.—If, pursuant to subsection (c), the Commission requires the establishment of a database of telephone numbers of subscribers who object to receiving telephone solicitations or a functionally equivalent methods or procedures of Federal regulation, a State or local authority may not develop any different database or system for use in the regulation of telephone solicitations and may not enforce restrictions on telephone solicitations in any manner that is not based upon the requirements imposed by the Commission.

"(3) STATE ENFORCEMENT PERMITTED.—Nothing in this section or in the regulations prescribed under this section shall prohibit the segmentation of the database or functionally equivalent method or procedure for use by State or local authorities, nor preempt any State or local authority from creating mechanisms to enforce compliance with the database or functionally equivalent system, or a segment thereof.

"(g) EFFECTIVE DATE OF REQUIREMENTS.—The requirements of this section shall take effect 30 days after the date that regulations are prescribed under subsection (c)."

SEC. 4. CONFORMING AMENDMENT.

Section 2(b) of the Communications Act of 1934 is amended by striking "Except as provided" and all that follows through "and subject to the provisions" and inserting "Except as provided in sections 223 through 227, inclusive, and subject to the provisions".

PURPOSE AND SUMMARY

The purpose of the bill (H.R. 1304) is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment. Specifically, the bill makes it unlawful

within the United States to use the telephone, or automatic dialing recorded message player (ADRMP) systems, to solicit individuals who have objected to receiving commercial telephone solicitations. In addition, it restricts use of facsimile machines, computers or other electronic devices to send unsolicited advertisements.

Although certain specific telephone uses are prohibited, the Committee does not attempt to make all unsolicited telemarketing or facsimile advertising illegal. Instead, H.R. 1304 is designed to return a measure of control to both individual residential telephone customers and owners of facsimile machines. When conducted properly, unsolicited commercial calls and faxes are an established lawful marketing practice.

With regard to intrusive telephone solicitation, the legislation requires that the Federal Communications Commission (FCC) conduct a rulemaking to compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, etc.) for protecting residential telephone subscriber privacy rights and to prescribe regulations implementing the most effective method or procedure.

H.R. 1304 also prohibits unsolicited ADRMP calls to any emergency telephone line or pager of any hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency; or to any telephone number assigned to paging, specialized mobile radio, or cellular telephone service. In addition, the bill requires the Commission to establish specific technical and procedural standards governing ADRMP solicitations and facsimile advertisements. The Commission is also required to conduct a separate rulemaking to prescribe rules to restrict the use of any telephone facsimile machine, computer, or other electronic device to send unsolicited advertisements. This rulemaking must consider the extent of unsolicited facsimile advertising, costs incurred by recipients, and the most cost effective methods for preventing abuses.

BACKGROUND AND NEED FOR THE LEGISLATION

In the United States, use of the telephone and related telecommunications technologies to conduct business has become commonplace. Since the 1920's, telephone marketing (telemarketing) has given businesses a cost-effective opportunity to broaden their markets as well as provide fast, efficient customer service information. However, rapidly decreasing telecommunications costs coupled with nationwide business use of sophisticated, computer driven telemarketing tools have caused the frequency and number of unsolicited telemarketing calls increase markedly.

In addition, businesses often use two other telephone-based technologies that offer a low cost means of communicating with prospective customers. Automatic dialing systems (automatic telephone dialers coupled with recorded message players) ensure that a company's message gets to potential customers in the exact same way, every time, without incurring the normal cost of human intervention. Advertisers have also seized on facsimile machines, often coupled to personal computers; as another potent tool for direct marketing of a number of products and services. An advertiser's facsimile machine can easily deliver tens of thousands of unsolic-

ited messages per week to other facsimile machines across the country.

TELEPHONE SOLICITATION ISSUES

Use of the telephone to market property, goods and services directly to business customers, as well as individual consumers, is not only a common practice, but also a high growth industry. According to Telemarketing Magazine, U.S. expenditures on telemarketing have grown from \$1 billion to \$60 billion over the past 10 years. Meanwhile, the dollar value of telemarketing sales has grown from just over \$80 billion in 1984 to \$430 billion in 1990.

Every day over 300,000 solicitors call more than 18 million Americans, for an average of 60 calls per solicitor. In addition, the Wall Street Journal reported that some 75,000 stockbrokers make some 1.5 billion calls a year—roughly 80 calls per stockbroker per business day.

The modern telemarketing industry

While some telemarketing businesses still rely on telephone directories, printed lists of prospective customers, and manual operations, the number of such businesses is dwindling. Today, computers assist an estimated 82 percent of America's businesses conducting telemarketing campaigns. And computer assistance goes far beyond dialing the telephone number of the prospective customer and transferring the call to the next available telemarketing service representative. The entire sales to service marketing function has been automated. Modern telemarketing software organizes information on current and prospective clients into databases designed to support businesses in every aspect of telephone sales—all with the objective of bringing the company's product or service to the customer most likely to purchase it.

In addition, a separate market exists to develop and enhance telemarketing databases. Hundreds of companies sell customized and off-the-shelf software for data base applications within mainframe, mini and personal computer environments. Their telemarketing software products are designed to meet the needs of any size business. A leading vendor of PC-based telemarketing software, for example, has sold roughly 80,000 copies of its product—over half the copies were sold to one-person businesses.

Another market exists for companies that specialize in maintaining demographic and psychographic databases designed to provide businesses with a wealth of personal and life-style data on as many as 50 or 60 million people. Businesses routinely purchase data from multiple sources in an effort to create unique product- or service-specific databases. And, the databases can be developed from multiple starting points: a name, address, or telephone number; a drivers license number or license plate; or a personal check or credit card number.

In addition, because people change addresses and telephone numbers often enough, a separate "confirmation" market has emerged within the database market. A typical fee for updating a company's file with new telephone numbers would include a charge of about \$2.00 per thousand numbers of input, plus \$5.00 per thousand num-

bers confirmed, plus \$20.00 per thousand numbers changed. Another update service will remove the names or numbers of those deceased within the last 18 months for a charge of 50 cents per thousand input names, plus \$25.00 per thousand removed.

In addition, industry periodicals include information and advice designed to help businesses develop telemarketing capabilities and tools, including sophisticated databases. As an adjunct to professional journals and other literature, the Direct Marketing Association also offers instructional video and audio tapes, and conference proceedings, at nominal fees. Topics identified in the Association's catalogue include: Database Management and the Privacy Issues; Merge/Purge Methodologies—Database Marketing Correlations; A Marketing Managers Primer to Database Marketing; How to Use Outside Databases Effectively; and numerous industry-specific database marketing tapes.

Although the introduction of the computer has greatly increased the effectiveness and efficiency of telephone marketing, modern telemarketing techniques and equipment do not guarantee the emergence of ethical, unintrusive telephone solicitation practices. The telemarketing industry labors under an extremely negative image. Highly publicized fraudulent telephone sales schemes appear to account for some of the problem, but there is also a public perception that some telemarketers are unethical and unscrupulous.

The responsible telemarketers want to change the industry's image. They favor placing reasonable restrictions on the industry to curb those practices the industry itself has been unable to control through voluntary programs. The Telemarketing Legislative Coalition, for example, shares the concern over the growing misuse of the telephone in direct marketing. This group, which consists of Chief Executive Officers from the nation's top 50 telemarketing agencies, openly acknowledges the need to solve the problems of unrestricted telemarketing and applauds the Committee's determination in pursuing enactment of H.R. 1304.

Telephone company studies

Studies conducted by two regional Bell operating companies (Bell Atlantic and Ameritech) have produced data showing the pervasive nature of telemarketing practices within their respective regions. These studies document residential telephone customer experience with—and attitudes towards—various types of problem calls, including sales/solicitation and computer/advertising. Both studies, which include data analogous to complaints, were conducted in conjunction with planned offerings of Caller ID services and are proprietary in nature. In several cases, they are a part of the record of ongoing litigation and are subject to certain disclosure—discussion restrictions imposed by the court. The Committee has obtained relevant excerpts and summaries of the companies' findings and conclusions.

Between July 1988 and October 1989, Bell Atlantic surveyed residential telephone customers in Maryland, Virginia, Delaware, Pennsylvania, New Jersey, and the District of Columbia. Sales/solicitation and Computer/advertising calls, respectively, were the most often mentioned type of problem or annoyance call. The per-

centage of the people interviewed mentioning problem sales/solicitation calls ranged from 35 (New Jersey) to 49 (Virginia). The percentage mentioning computer/advertising calls ranged from 13 (Virginia) to 21 (Maryland).

Ameritech's annoyance call studies sampled customer experience and projected the percentage of customers that would receive the different types of calls studied. A November 1990 Ameritech study found an estimated 3.1 million Illinois residential customers (90 percent) would receive an average of 36 sales/telemarketing calls per year. Some Illinois Bell customers would receive only one sales/telemarketing call, but others could receive as many as 730 such calls in a given year. An earlier March 1990 study estimated 1.6 million Ohio customers (68 percent) would receive between one and 760 sales/telemarketing calls in a given year. This study found that an estimated 256,000 Ohio Bell customers would receive over 50 such calls per year.

The Bell Atlantic and Ameritech study results parallel the findings of a September 1990 survey conducted by The Roper Organization, Inc. To find out what things most annoy Americans, Roper interviewed a nationwide cross-section of 2,000 adults over the age of 18, face-to-face, in their homes. Each respondent was given a list of 19 annoying things and asked to rate each as (1) very annoying, (2) somewhat annoying, (3) doesn't bother, or (4) don't know.

Phone calls from people selling things were identified as very annoying by 67 percent of the respondents. Only phone calls from a computer trying to sell something were found to annoy more people (70 percent). Surveys that are really just selling things were found to be very annoying by 63 percent of those interviewed. In contrast, people coming to your house trying to sell things (door-to-door salesmen) were very annoying to 54 percent of those surveyed.

Increase in unlisted numbers

According to the Consumer Federation of America, the change in the percentage of unlisted residential telephone numbers is another indicator of consumer's desire to free themselves from intrusive telemarketing practices. A recent survey of U.S. households revealed that the percentage of unlisted numbers has increased by 30 percent nationwide since 1984.

The Consumer Federation asserts that the increase in the number of residential telephone subscribers purchasing unlisted numbers provides evidence of peoples' frustration with unwanted calls and indicates a need to restore a measure of privacy to their lives. However, even with an unlisted number, consumers may not get the protection they desire. According to USA Today, some companies have already developed software that numerically sorts listed numbers and identifies the missing numbers, which are likely to be unlisted.

State laws—legislation

Many States have passed laws that seek to regulate telemarketing through various time, place and manner restrictions. Florida is attempting to regulate telemarketers through a "do not call" database. However, telemarketers can easily avoid the restrictions of State law, simply by locating their phone centers out of state.

States are nonetheless actively exploring ways of bringing intrusive telemarketing practices under control.

According to the Direct Marketing Association, there are 43,000 bills touching on the practice of direct marketing pending before state legislatures. Of these, 475 bills are related to privacy. There are 18 bills that would establish do-not-call lists. Under the circumstances, a substantive argument can be made that federal legislation is needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards.

The preponderance of the evidence documents the existence of a national problem and argues persuasively in favor of federal intervention balancing the privacy rights of the individual and the commercial speech rights of the telemarketer.

AUTOMATIC DIALING SYSTEMS

In recent years a growing number of telemarketers have begun using automatic dialing systems to increase their number of customer contacts. The Committee record indicates that these systems are used to make millions of calls every day. Each system has the capacity to automatically dial as many as 1,000 phones per day. Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers.

Once a phone connection is made, automatic dialing systems can "seize" a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well. Despite these limitations—and the negative public image associated with these systems and the companies that use them—ADRMP use has not declined substantially. The Committee record also includes examples of this technology being employed in conjunction with 900 number schemes.

FACSIMILE ADVERTISING

An office oddity during the mid-1980s, the facsimile machine has become a primary tool for business to relay instantaneously written communications and transactions. In an effort to speed communications and cut overnight delivery costs, millions of offices in the United States currently send more than 30 billion pages of information via facsimile machine each year. However, the proliferation of facsimile machines has been accompanied by explosive growth in unsolicited facsimile advertising, or "junk fax."

Facsimile machines are designed to accept, process, and print all messages which arrive over their dedicated lines. The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient's machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.

HEARINGS

On April 24, 1991, the Committee's Subcommittee on Telecommunications and Finance held a legislative hearing on H.R. 1304 (and related legislation H.R. 1589, the Telephone Privacy Act, and H.R. 1305, the Telephone Consumer Privacy Act). Testimony was received from 10 witnesses representing 9 organizations, with additional materials received from 6 organizations.

COMMITTEE CONSIDERATION

On May 9 1991, the Subcommittee on Telecommunications and Finance met in open session and ordered reported the bill H.R. 1304, as amended, by a voice vote, a quorum being present. On July 30, 1991, the Committee met in open session and ordered reported the bill, H.R. 1304, with an amendment, by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Subcommittee held hearings and made findings that are reflected in the legislative report.

COMMITTEE ON GOVERNMENT OPERATIONS

Pursuant to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

COMMITTEE COST ESTIMATE

In compliance with clause 7(a) of rule XIII of the Rules of the House of Representatives, the Committee believes that the cost incurred in carrying out H.R. 1304 would be approximately \$350,000 in FY 1992 and \$250,000 each year thereafter.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 20, 1991.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1304, the Telephone Advertising Consumer Rights Act, as ordered reported by the Committee on Energy and Commerce on July 30, 1991. CBO estimate that implementation of H.R. 1304 would cost between \$4 million and \$6 million over the next five years, assuming appropriation of the necessary amounts. Enactment of H.R. 1304 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

H.R. 1304 would ban unsolicited telemarketing calls to emergency services, paging and cellular telephones. The bill would also ban unsolicited facsimile advertisements. H.R. 1304 would direct the

Federal Communications Commission (FCC) to revise standards for telephone facsimile machines and artificial and prerecorded voice systems. Finally, the bill would direct the FCC to conduct a rule-making proceeding examining the need to protect the privacy rights of residential telephone subscribers and to prescribe regulations protecting such privacy rights.

Based on information from the FCC, CBO estimates that promulgating and enforcing the various rules would cost about \$700,000 over the next five years. The FCC may determine that a database containing a list of residential subscribers who object to receiving telephone solicitations is required to protect the privacy rights of residential telephone subscribers. If such a database is required, creation, maintenance, and use of such a database could cost between \$3 million and \$5 million over the next five years, depending on the size and capabilities of the system. We believe that such a database would probably be required.

CBO estimates that enactment of this bill would result in no cost to state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John Webb, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee makes the following statement with regard to the inflationary impact of the reported bill:

H.R. 1304 will have no inflationary impact.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

SECTION 1. SHORT TITLE

This Act may be cited as the "Telephone Advertising Consumer Rights Act."

SECTION 2. FINDINGS

The bill makes several findings regarding modern telemarketing technology and practices; intrusions upon individual privacy rights and public safety concerns; and the need for a federal solution that both protects the privacy rights of individual residential telephone subscribers and permits legitimate telemarketing practices.

SECTION 3. AMENDS THE COMMUNICATIONS ACT BY ADDING A NEW SECTION 227—RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING

Subsection a. Defines the terms automatic telephone dialing system, telephone facsimile machine, telephone solicitation, and unsolicited advertisement.

Definition of telephone solicitation

Under H.R. 1304, the term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services which is transmitted to any person (A) without that person's prior express invitation or permission, or (B) with whom the caller does not have an established business relationship. Such term does not include a call or message by a tax exempt nonprofit organization.

The term does not apply to calls or messages where the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications. In addition, if a subscriber has given "prior express permission or invitation" to a telephone solicitation, this consent renders the call solicited and relieves the caller of liability for relying on such permission. The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling need for such consent to be in written form. Requiring written consent would, in the Committee's view, unreasonably restrict the subscriber's rights to accept solicitations of interest and unfairly expose businesses to unwarranted risk from accepting permissions or invitations from subscribers. However, enterprises relying on the exception should establish specific procedures for obtaining prior permission and maintaining appropriate documentation with respect to such permission.

To come within the definition, a caller must encourage a commercial transaction. Thus, the Committee does not intend the term "telephone solicitation" to include public opinion polling, consumer or market surveys, or other survey research conducted by telephone. A call encouraging a purchase, rental or investment would fall within the definition, however, even though the caller purports to taking a poll or conducting a survey.

Survey research conducted by telephone is not covered by the legislation for a number of reasons. First, such research has generated relatively few complaints from subscribers. Equally important, the results of telephone surveys could be rendered unreliable if the pool of subscribers available to be called was to be artificially limited by "Don't Call" lists or by other means. Alternative means of conducting surveys are significantly more expensive, and less practical, than telephone surveys.

The Committee's rationale for exempting calls where the caller has an established business relationship and excluding calls from charitable—political organizations is discussed below.

Exemption of established business relationships

the bill reflects a balance the Committee reached between barring all calls to those subscribers who objected to unsolicited calls, and a desire to not unduly interfere with ongoing business relationships. To provide as much protection as possible to the former interest while respecting the latter, the Committee adopted an exception to the general rule—that objecting subscribers should not be called—which enables businesses to continue established business relationships with customers.

The Committee considered whether and under what circumstances a telephone subscriber could be solicited by telemarketers notwithstanding the fact that the subscriber is listed in a national database, or otherwise protected from unsolicited calls through an alternative mechanism. The Committee found that subscribers' objections to telemarketing initiatives were twofold. The first element pertains to the volume of unwanted calls. The second involves the unexpected nature of the calls. That is, the absence of any current or prior dealings with the caller was the source of many objections.

The Committee concluded that an enterprise having an "established business relationship" with a subscriber should be permitted to solicit the subscriber even if the subscriber otherwise objected to unsolicited calls. The existence of the relationship at the time of the solicitation, or within a reasonable time prior to it, would form the basis for the new solicitation, provided that it substantially relates to the products or services forming the basis of the relationship.

Under the exception adopted by the Committee, an established business relationship would include a business entity's existing customers, for which an established business relationship is clearly present. Therefore, magazines, cable television franchises, and newspapers all could call their current subscribers to continue their subscriptions even if such subscribers objected to "unsolicited" commercial calls. Similarly, credit card companies could call current cardholders, including holders of affiliated cards. Stockbrokers or lawyers could call current clients at home to discuss existing portfolios or ongoing legal cases. In the case of mutual funds, calls by the fund's manager to existing shareholders would not be covered. In addition, if an investor had written to a mutual fund or responded to an ad requesting additional information, the fund's manager could make follow-up calls, which would not be subject to H.R. 1304's restrictions.

In the Committee's view, an "established business relationship" also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. However, the Committee strongly believes that a subsequent telemarketing solicitation by an entity with an "established business relationship" to an objecting consumer must be substantially related to the product or service which formed the basis of the prior relationship. By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services.

The Committee recognized this relationship so as not to foreclose the capacity of businesses to place calls that build upon, follow up, or renew, within a reasonable period of time, what had once been "existing customer relationship." For example, magazine publisher would be able to call someone who has let their subscription lapse. A person who recently bought a piece of merchandise may receive a call from the retailer regarding special offers or information on related lines of merchandise. A loan officer or financial consultant may call a telephone subscriber who had requested a loan or

bought auto insurance a couple of months ago to pitch new loan offerings or other types of insurance.

On the other hand, the Committee does not believe that an "established business relationship," formed through a prior transaction, negotiation, or inquiry between the called party and the business entity regarding one element of the business, means that a business relationship necessarily also has been established for unaffiliated divisions, subsidiaries, or other disparate parts of the same business entity. In other words, a relationship established through the purchase of a piece of merchandise from a company's retail or catalogue division does not necessarily mean that a business relationship has been established between the customer and the company's other unaffiliated divisions or subsidiaries, or divisions that a customer would not associate with the initial contract or purchase.

However, the Committee recognizes that contact by an affiliate of the company having the business relationship would be permissible if the solicitation by the affiliate related to a transaction in progress with the subscriber or was substantially related to the product or service forming the basis of the business relationship. Consequently, the Committee believes that under these specific circumstances, it would be generally consistent with subscribers' expectations for affiliated companies to solicit subscribers. However, the Committee anticipates that affiliate solicitations will be few in number—the exception rather than the rule—and stresses its view that it would be inappropriate for an affiliate company to rely on the established business relationship exception to solicit a subscriber with respect to products or services not substantially related to those upon which its affiliate's business relationship was based.

In sum, the Committee believes the test to be applied must be grounded in the consumer's expectation of receiving the call. Consequently, the test shall consist of a determination of whether the new solicitation occurs within a reasonable period of time and the new product or service being promoted is related substantially to the prior relationship. The Committee intends this test to be one of substance and not one of form. Nothing in the test necessarily would bar solicitations by affiliates of an entity, so long as the contact occurs within a reasonable period of time and the product or service being promoted is substantially related. In short, the Committee finds this test, which focuses on the substance of the contact, that is, the presence of an established business relationship, and not the form of the corporate organizational structure, to be necessary and relevant.

The Committee emphasizes that businesses should not view the presence of an established relationship as absolute relief from subscribers' privacy requests. If a subscriber asks a company with whom it has an established relationship not to call again, the company has an obligation to honor the request and avoid further contacts. Despite the fact that objecting subscribers can be called based on an "established business relationship," it is the strongly held view of the Committee that once a subscriber objects to a business that calls based on an established relationship, such a business must honor this second objection and implement procedures not to call that twice-objecting subscriber again. Businesses calling

established customers who object to unsolicited calls must remember that these are subscribers who have made a predetermination that they will not be receptive to unsolicited telemarketing. The telephone subscriber's second objection, which is a company-specific objection, must be respected by that company. The Committee expects the FCC to address this matter within the required rulemaking.

The definition of a "telephone solicitation" is in no way intended to include calls to collect debts or to follow up on billing a subscriber for some service, purchase or other transaction.

Exclusion of calls from tax exempt organizations

The Committee made the public policy determination to exclude calls made by charitable or political organizations on the basis of the record, which does not contain sufficient evidence to demonstrate that calls from these tax exempt nonprofit organizations should be subject to the restrictions provided for under the bill. To the contrary, the record suggests that most unwanted telephone solicitations are commercial in nature.

Complaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations. In response to a request from the Subcommittee on Telecommunications and Finance, the National Association of Consumer Agency Administrators polled its state level members for statistical data describing the extent to which consumer complaints about unsolicited telemarketing calls involved commercial, charitable, or political calls. States with statistical data readily available provided the following information:

State	Percentage of consumer commercial calls	Complaints involving charitable calls
Kansas	99.0	1.0
Colorado	99.0	1.0
Florida	94.5	5.5
Texas	92.8	7.2
Rhode Island	90.0	10.0
South Carolina	87.7	12.3
Virginia	86.3	13.7
Vermont	80.0	20.0
California	80.0	20.0

Other states (including New York, Tennessee, Nevada, and Washington) responded that consumer complaints about unsolicited telemarketing involved calls that were "mostly commercial" in nature.

In addition to the relative low volume of non-commercial calls, the Committee also reached the conclusion, based on the evidence, that such calls are less intrusive to consumers because they are more expected. Consequently, the two main sources of consumer problems—high volume of solicitations and unexpected solicitations—are not present in solicitations by nonprofit organizations.

However, to allow for the possibility that charitable or political calls might—in pockets of the country—represent as serious a problem as commercial solicitations, a special requirement (Subsection

c(1)(D)) was added to H.R. 1304. It directs the Commission to consider whether there was a need for additional authority to further restrict telephone solicitations, and if such a finding is made and supported by the record, to propose specific restrictions to the Congress. The Committee expects the Commission's proposal to consider fully constitutional limitations on any proposed restrictions.

In crafting H.R. 1304, the Committee was sensitive to restraints on its authority to regulate the speech of charitable and political organizations, speech which the Supreme Court has identified as "core" First Amendment Speech. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). As demonstrated above, the Committee found that solicitations by such organizations were less of a problem than commercial calls. It is on this basis that the Committee believes that the scope of the regulation is a workable "commercial speech" distinction consistent with Supreme Court precedent. See *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). Finally, the Committee relied on the research of the American Law Division of the Congressional Research Service and the American Civil Liberties Union to conclude that these restrictions justified by the magnitude of the problem and that such restrictions remain faithful to Supreme Court precedent on protections to be accorded "commercial speech."

Subsection b. Restrictions: The bill makes it unlawful:

To solicit telephone subscribers in violation of FCC regulations to protect privacy rights required under subsection (c);

To use for purposes of solicitation any facsimile machine or automatic dialing system that does not comply with technical and procedural standards specified in the bill;

To use any fax machine, computer or other device to send an unsolicited advertisement in violation of future FCC regulations;

To use an automatic dialing system to make unsolicited calls to any emergency telephone line or pager of any hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency; and

To use a computer or other electronic device to send an unsolicited advertisement via a fax machine that does not meet certain specific marking requirements.

The restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers. For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid.

Consumer complaints

Subsection c. Protection of Subscriber Privacy Rights: The Committee found that unsolicited telemarketing most often is targeted toward consumers who are not familiar with the company's product or service. But all too frequently it represents more of a nuisance than an aid to commerce. Whether an individual or a machine is on the other end of the line, consumers find unsolicited telemarketing calls an intrusive, often frustrating, invasion of their privacy. The nightly recurrence of calls from solicitors and automated machines trying to sell something is now a predictable part of many lives, yet consumers can do nothing to change things. The expert testimony, data, and legal analyses comprising the Committee's record, and broad support of consumers, state regulators, and privacy advocates clearly evidence that unsolicited commercial telemarketing calls are a widespread problem and a federal regulatory solution is needed to protect residential telephone subscriber privacy rights.

The Committee's records include expert testimony and data provided by the National Association of State Utility Consumer Advocates, which represents the 43 state utility consumer advocates in 38 states and the District of Columbia. The Association's witness, Mr. Jack Shreve, Public Counsel for the State of Florida, testified that Florida's Division of Consumer Services typically received an average of 250 written complaints per month and double that amount of telephone complaints per month, regarding problems about unsolicited calls.

In response to a post-hearing question, the Association noted that the Florida experience is fairly typical of other states, but noted that complaints about unsolicited calls are also received by states' Commerce Departments, Public Utility Commissions, Attorneys General, Consumer Protection Agencies and others. The Federal Trade Commission (FTC), the FCC, Better Business Bureaus and local telephone companies also receive complaints about unsolicited telephone calls.

Although there is no single repository of consumer complaints about unwanted commercial telephone calls, and the various organizations tracking these complaints do not use comparable methodologies, the Committee record contains consumer complaint data documenting the widespread nature of intrusive telephone solicitation problems.

Subsection c(1). Rulemaking Proceeding Required: Within 120 days, the FCC must initiate a rulemaking on the need to protect consumers from telephone solicitations to which they object. The proceeding shall compare and evaluate alternative methods and procedures, evaluate categories of entities with the capacity to establish and administer such methods and procedures, consider whether different methods should apply for local telephone solicitations, and consider whether additional FCC authority is needed to restrict solicitations from organizations exempted under subsection (a)(3) of the bill.

With regard to H.R. 1304's requirement that the FCC conduct a rulemaking to compare and evaluate alternative methods and procedures, the Committee received the following suggestions from af-

affected parties: electronic databases, telephone network technologies, special directory markings, and industry-based or company-specific "do-not-call" systems. The FCC should consider these or any other alternatives, either individually or in combination with others. Although the legislation gives the FCC latitude within its rulemaking to select among different methods and procedures to protect consumers from unsolicited telephone calls, the Committee expects the Commission to choose the alternative that is most effective in protecting telephone subscriber privacy.

Possible remedies—limitations

The goal of this rulemaking is to identify and implement the most effective and efficient means of protecting telephone subscriber privacy. The Committee believes that the electronic database alternative is the option with the potential to provide the most effective, efficient and economic control at the national, regional, state and local levels. The Committee feels that the electronic database alternative is the most viable, cost effective means of balancing individual privacy and commercial speech rights. However, the Commission's Rulemaking may disclose additional information unavailable to the Committee that would dictate a different outcome. In reviewing other alternatives, the Committee notes the major factors limiting the effectiveness of these alternatives.

For instance, telephone network technologies could be effective and highly efficient, but may not be available until after the year 2000. These remedies are dependent on the existence of advanced switching (Signalling System 7) and intelligent network capabilities throughout the national telephone network. The Committee record indicates that at today's cost, the expense of developing identification and blocking software, assigning special identifying numbers to the tens of thousands of companies that telemarket, and determining how to bill individual telemarketers for calls blocked, is expected to be far more expensive than the cost of developing a do-not-call database application with off-the-shelf software.

The special directory markings alternative also appears less effective than the database option—due to difficulties publishing and shipping updates to national, regional, state or local directories on a quarterly or semi-annual basis. The printing and mailing costs of special directories is another major disadvantage. Moreover, they are less efficient because they do not fit within the modern, computer-based telemarketing environment, and as such could discourage computer-based telemarketers (82 percent of the industry) from using them. Consequently, such directories only may be useful to a fraction of the 18 percent of the industry that is not telemarketing in an automated environment (i.e., those businesses which use the telephone directory as a primary source of prospective telemarketing customers.)

An industry "do-not-call" database known as the telephone Preference Service has been maintained and operated by the Direct Marketing Association for several years. The Committee recognizes that some responsible telemarketers already use this tool as a method for avoiding potentially unproductive calls, as well as protecting individual privacy. The Committee commends these efforts, but notes that this database is not comprehensive in nature and

that the Association has not enjoyed great success in persuading individual companies to utilize it. The Committee record shows that the database contains fewer than 500,000 names and telephone numbers and that only 82 of the Association's 3,800 members use it. The record established by the Committee strongly indicates that consumer complaint statistics, telephone company studies, and other independent polls attest to the need for a more effective and comprehensive means of protecting consumer telephone privacy rights.

Company specific databases, which also have been used for several years, provide some protection of telephone subscriber privacy rights, but are not seen as a comprehensive, industry-wide solution to intrusive telephone solicitation. Moreover, the Committee is concerned that the selection of this alternative could place unreasonable burdens on consumers and regulators. From the consumer's standpoint, it would be burdensome to require the residential telephone subscriber whose privacy is being invaded to personally request each of the tens of thousands of companies that telemarket not to call. For regulators, the major disadvantage associated with this alternative is the regulatory enforcement nightmare it would create for the FCC and state and local regulators tasked with overseeing so many (potentially tens of thousands) different "do-not-call" systems. With respect to both company-specific and industry-wide databases, the Commission should consider whether making such practices mandatory, and imposing substantial sanctions for violations, would increase their effectiveness to the point that they could satisfy the statutory requirements of this Act.

Subsection c(2). Regulations: Within 240 days, the FCC shall prescribe regulations to protect privacy rights in an efficient, effective and economic manner without any additional charge to telephone subscribers.

Subsection c(3). Use of Database Permitted: This section gives the FCC authority to require establishment and operation of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations and establishes specific requirements to be addressed in regulations. In developing the electronic database alternative, the Committee sought a minimally restrictive regulatory tool which would be comprehensive in scope, effective in operation, and easy to implement and enforce.

Development of the electronic database alternative

The database concept was developed to specifically address direct marketer and retailer concerns that the "clearinghouse" provided for in H.R. 2921 (101st Congress) would lead to a costly, bureaucratic regulatory structure. The specific alternative included in H.R. 1304 was developed as a result of investigations into telemarketing industry business operations. The committee sought to develop a regulatory tool that would fit easily into the machinery of the modern, computer-based telemarketing operation. Many of the specific requirements associated with the database alternative were developed out of additional concerns expressed by the Direct Marketing Association and National Retail Federation. The committee's intent was to direct the Commission to investigate regulatory alternatives that would address the operations of all telemarketers

and to recognize that the Commission may choose different approaches for various categories of telemarketers.

As a result of these efforts to develop and improve the database alternative, the Committee finds that establishment of a national database to be a well defined option available to the FCC for addressing the problem of intrusive telephone solicitation. The several additional public policy factors unique to the database solution that the FCC is required to consider also recommend this alternative. Finally, the Committee undertakes a detailed discussion of the alternatives because of the untried nature of this option and the Committee's clear intent that this option be given serious consideration. The Committee further believes that because state laws will be preempted, the Federal statute must be sufficiently comprehensive and detailed ensure States' interests are advanced and protected. The committee anticipates that the Commission's review will show that the database alternative will fully serve the manifold interests discussed above.

Database cost assumptions

Cost was one of the largest concerns voiced in conjunction with the database option. Telemarketers were concerned that the proposed database would be expensive to develop and maintain. To address this concern, the Committee requested cost estimates from the FCC and private companies. The following guidance was provided:

- (1) The cost of developing and operating the database would be paid for in charges to telemarketers.
- (2) Estimates should consider only those costs that are directly related to the development of the database.
- (3) Administrative, rulemaking, or indirect costs (other than those normally allocable to personnel and equipment resources directly related to the database) were not allowable.
- (4) Enforcement costs are not an appropriate systems development and operation cost element.
- (5) The database will consist of 10 million, 10 digit records and would be developed by a least-cost contractor.
- (6) Local telephone companies will absorb the cost of bill or directory inserts.
- (7) Residential subscribers will pay the cost of postage, but not the cost of long distance phone charges should an 800 number be used.
- (8) Database updates will be made quarterly.
- (9) Local telephone companies will assist in maintenance through the new service hook-up and service disconnect interviews.

The potential "size" of the database (the number and length of records it will contain) was a critical cost estimate assumption. Database size translates into the number of residential telephone subscribers that will place their phone numbers in the database. The Committee's size estimate of 10 million subscribers is supported by the operating experience of businesses and states that currently utilize "do not call" databases or similar mechanisms.

According to Telemarketing Magazine, for example, the internal "do not call" lists maintained by nationwide telemarketing service agencies generally contain around 1.5 million numbers (less than 2

percent of the 88.4 million total U.S. residential phone lines). Even the largest firms, which call every household in America at least once a year, have fewer than 5 million numbers (less than 6 percent of the population) on their lists.

Over the past 4 years, Massachusetts has averaged about 250,000 telephone numbers (about 10 percent of the state residential line population) in its "no recorded solicitations" database. Florida now has about 26,100 telephone numbers (less than 1 percent of the residential phone lines) in its "do not call" database. The Direct Marketing Association's national database contains fewer than 500,000 names.

Database cost estimates

Several organizations submitted estimates of the cost of developing and operating the database permitted in H.R. 1304. In a memorandum dated April 23, 1991, the FCC provided two estimates. For what it called a "minimal" system, FCC estimated a total hardware and software (development) cost of \$1 million and total annual (operating) costs of \$294,481. For an "upper end" system, FCC estimated total development costs at \$6 million and annual operating expenses at \$597,000. This was the highest estimate received by the Committee. In an August 23, 1991, response to a request for another estimate, FCC estimated the development cost at between \$500,000 and \$2.5 million and annual operating costs at \$500,000.

The National Exchange Carriers Association provided the second highest estimate received by the Committee. The Association's estimate of the database development costs was approximately \$3 million, two-thirds of which was attributable to the cost of 800 number telephone lines. Annual operating costs were estimated at \$500,000.

The Committee's record also includes database cost estimates from other organizations that are expert in database applications in the telecommunications environment at the national level. These organizations, which include AT&T and Sprint-United Telcomm, routinely customize such applications to meet the needs of hundreds of government and business customers. For the database envisioned in H.R. 1304, their development cost estimates range from approximately \$1 to \$3 million, with annual operating costs of \$500,000.

In developing its estimate, AT&T assumed a phased development of the database over a three year period during which combined development and operating costs would average \$850,000 per year. The annual cost of operating the system in year four and beyond was estimated at \$500,000.

Sprint utilized a unit cost (per record charge) estimating technique in extrapolating systems development costs under two alternative scenarios. Under one development scenario, Sprint assumed use of audio response technology connected to an 800 number with automatic number identification. The estimated per record cost range under this development methodology was between 22 and 33 cents. A 10-million record 10-digit database would cost between \$2.2 and \$3.3 million to develop under the 800 number scenario.

Under the second scenario, Sprint assumed the use of machine-readable postcards (which could be included within new white

pages directories, inserted in bills, or provided in service disconnect new service hook-up interviews). Assuming that residential telephone subscribers would provide the stamp, the estimated per record cost range under this methodology was between 8 and 14 cents. A 10-million record 10-digit database would cost between \$800,000 and \$1.4 million to develop under the machine readable card scenario.

According to the Massachusetts Department of Public Utilities, it cost the State approximately \$400,000 to develop their "no recorded messages" database. Florida estimates the cost of developing its "do not call" database at approximately \$125,000.

Additional clarifications

To help ensure that the specific requirements in subsection c(3) are interpreted correctly, the Committee offers the following clarifications:

(1) In the language authorizing the FCC to establish and operate a single national database (Subsection c(3)), reference is made to telephone subscribers who object to receiving certain classes or categories of telephone solicitations. The Committee intends that this reference be interpreted as including the following broad categories of solicitation: commercial, charitable, and political. This reference is intended to work hand-in-glove with the requirement for the FCC to consider whether additional authority is needed to further restrict telephone solicitations (Subsection c(1)(D)). The Committee does not intend for the FCC to offer consumers an opportunity to receive telephone solicitations from one type of business, but avoid those of another. Such an interpretation is not supported by the record and would be burdensome to both the regulator and the regulated. It would also add substantially to the complexity and cost of the database alternative.

(2) In requiring the FCC to specify the method by which the Commission will select an entity to administer the database (Subsection c(3)(A)), the Committee intends that the Commission contract out, or enter into other arrangements, for the development and administration of the national database, rather than administer it in-house.

(3) In prohibiting any residential subscriber from being charged for having their telephone number added to, or deleted from, the national database (Subsection c(3)(E)), the Committee does not intend to prevent telephone subscribers from incurring nominal expenses for postage or long distance charges.

(4) In prohibiting any person from making or transmitting a telephone solicitation to any telephone number in the national database (Subsection c(3)(F)), the Committee intends to prevent businesses, and/or their telemarketing service agents from making unsolicited calls to residential subscribers who object to receiving telephone solicitations and have registered this objection by subscribing to the national database. It does not intend to prohibit a telephone company from placing calls involving telephone solicitations over its facilities. Such a burden would be unreasonable, if not infeasible.

(5) In requiring the FCC to specify the methods for recovering from persons accessing the database the developmental and oper-

ational costs involved (Subsection c(3)(H)), the Committee intends to place the primary financial burden on the businesses and service agencies that engage in telemarketing. In addition, the Committee intends the purchase and use of the database to be an integral part of a business' defense in resolving enforcement claims.

(6) In requiring FCC to specify the frequency with which the database will be updated and the method by which such updating will be implemented (Subsection c(3)(I)), the Committee directs the FCC to recognize in regulations mandated by the bill, that an estimated 16 to 20 percent of the nation's residential telephone numbers change each year. The Committee believes that the Commission should determine the optimum time frame for necessary updates, but that such updates should occur at least semi-annually.

The Committee recognizes the implementation of this legislation will in some situations involve certain reasonable delays. The Committee expects there will likely be a time-lag between the date on which the consumer first seeks protection of his privacy rights and the date on which he can expect to be free from unwanted telephone solicitations. Similarly, whenever a telephone subscriber changes address and telephone number, another implementation delay of up to six to twelve months should reasonably be expected. The actual period of delay will correspond to the update period chosen by the FCC.

Subsection c(4). Considerations Required for Use of Database Method: This provision requires the FCC to consider several additional public policy factors pertaining to the needs of national, regional, State and local telemarketers and certain cost considerations.

Subsection d. Technical and Procedural Standards.

Subsection d(1). Telephone Facsimile Machines: Fax machines manufactured 6 months after enactment, and used for unsolicited advertising, must clearly mark each transmitted page, or the first page of each transmission, with the date and time sent, the identity of the business or other entity sending the advertisement, and the telephone number of the sending machine or of such business. Machines without automatic dialing—transmission capabilities and unable to interfere with a computer are exempt for 12 months after the date of enactment.

Subsection d(2). Automatic Telephone Dialing Systems: All prerecorded messages shall, at the beginning of the message, clearly state the identity of the business or other entity initiating the call and, during or after the message, state clearly the telephone number or address of such business or entity. The Bill also requires that as soon as technically practicable after the called party hangs up, such machines automatically create a disconnect signal or on-hook condition that allows the called party's line to be released.

The Committee record includes examples of systems calling and seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services. In addition, customers who pay additional fees for cellular phones, pagers, or unlisted numbers are inconvenienced and even charged for receiving unsolicited calls from automatic dialer systems.

The Committee does not intend to extend the prohibition on use of automatic dialers to unsolicited telephone calls made for the purposes of providing a public safety message or warning. The Committee finds that governmental and non-governmental entities should be permitted to use automated telephone dialing systems to provide public health and safety warnings.

The technical flaws of automatic dialing systems have engendered numerous consumer complaints about their use and have prompted more than half the state legislatures to enact or introduce legislation that restricts or totally bans their use. However, because regulatory jurisdiction is shared between federal and state agencies, telemarketers have been able to circumvent more restrictive regulation. By altering the routing of their calls among intra-state and interstate telephone lines, telemarketers have sought the least restrictive regulatory requirements.

Eighteen states prohibit and 23 states restrict the use of automatic dialing and announcing devices for commercial solicitation and legislation to impose a federal ban on the use of this technology has been introduced in the House and Senate.

Subsection e. Consideration of Facsimile Machine Restrictions: Within 120 days, the FCC must initiate a rulemaking to restrict the use of FAX machines, computers or other electronic devices to send unsolicited advertisements. The rulemaking must consider the cost borne by recipients, and the most cost effective methods of preventing facsimile advertising abuses.

The Committee found that when an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter. In the case of fax advertisements, however, the recipient assumes both the cost associated with the use of the facsimile machine and, the cost of the expensive paper used to print out facsimile messages. It is important to note that these costs are borne by the recipient of the fax advertisement regardless of their interest in the product or service being advertised.

In addition to the costs associated with fax advertisements, when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable to process actual business communications. Only the most sophisticated and expensive facsimile machines can process and print more than one message at a time. Since businesses have begun to express concern about the interference, interruptions and expense that junk fax have placed upon them, states are taking action to eliminate these telemarketing practices. Connecticut and Maryland have enacted laws banning the use of facsimile machines for unsolicited advertising. Similar bills are currently pending in the legislatures of about half the states.

Subsection f. Effect on State Law: States may impose more restrictive intrastate requirements on the use of telephone facsimile machines and automatic telephone dialing systems. However, if the FCC requires establishment of the database permitted in subsection c(3), State or local authorities' regulation of telephone solicitations must be based upon the requirements imposed by the FCC. State

and local authorities may enforce compliance with the database, or functionally equivalent system, or a segment thereof.

Subsection g. Effective Date of Requirements: Thirty days after FCC prescribes regulations under subsection (c).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

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TITLE I—GENERAL PROVISIONS

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APPLICATION OF ACT

SEC. 2. (a) * * *

(b) **【Except as provided in sections 223 or 224 and subject to the provisions】** *Except as provided in sections 223 through 227, inclusive, and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classification, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).*

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TITLE II—COMMON CARRIERS

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SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

(a) *DEFINITIONS.—As used in this section:*

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator;

(B) to dial such numbers; and

(C) to deliver, without initial live operator assistance, a prerecorded voice message to the number dialed, with or without manual assistance.

(2) The term "telephone facsimile machine" means equipment which has the capacity to do either or both of the following: (A) to transcribe text or images (or both) from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person (A) without that person's prior express invitation or permission, or (B) with whom the caller does not have an established business relationship. Such term does not include a call or message by a tax exempt nonprofit organization.

(4) The term "Unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person (A) without that person's prior express invitation or permission, or (B) with whom the caller does not have an established business relationship.

(b) **RESTRICTIONS.**—It shall be unlawful for any person within the United States by means of telephone—

(1) to make any telephone solicitation in violation of the regulations prescribed by the Commission pursuant to subsection (c);

(2) to use, to make any telephone solicitation, any telephone facsimile machine or any automatic telephone dialing system that does not comply with the technical and procedural standards prescribed under subsection (d), or to use, to make any telephone solicitation, any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards;

(3) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement in violation of any regulations prescribed by the Commission pursuant to subsection (e);

(4) to use any automatic telephone dialing system to make unsolicited calls—

(A) to any emergency telephone line or pager of any hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency; or

(B) to any telephone number assigned to paging, specialized mobile radio, or cellular telephone service; or

(5) to use a computer or other electronic device to send an unsolicited advertisement via a telephone facsimile machine unless such person clearly marks, in a margin at the top or

bottom of each transmitted page of the advertisement or on the first page of each transmission, the date and time it is sent, an identification of the business sending the advertisement, and the telephone number of the sending machine or of such business.

(c) **PROTECTION OF SUBSCRIBER PRIVACY RIGHTS.**—

(1) **RULEMAKING PROCEEDING REQUIRED.**—Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory marketings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) **REGULATIONS.**—Not later than 240 days after the date of enactment of this section, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) **USE OF DATABASE PERMITTED.**—The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, or to receive certain classes or categories of telephone solicitations, and to make that compiled list available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, or (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in notifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with subsection (b);

(J) be designed to enable and require States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) **CONSIDERATIONS REQUIRED FOR USE OF DATABASE METHOD.**—If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers con-

ducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(d) **TECHNICAL AND PROCEDURAL STANDARDS.**—

(1) **TELEPHONE FACSIMILE MACHINES.**—The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after 6 months after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business or other entity sending the advertisement, and the telephone number of the sending machine or of such business. The Commission shall exempt from such standards, for 12 months after such date of enactment, telephone facsimile machines that do not have the capacity for automatic dialing and transmission and that are not capable of operation through an interface with a computer.

(2) **AUTOMATIC TELEPHONE DIALING SYSTEMS.**—The Commission shall prescribe technical and procedural standards for automatic telephone dialing systems that are used to transmit any prerecorded telephone solicitation. Such standards shall require that—

(A) all prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business or other entity; and

(B) such systems will, as soon as is technically practicable (given the limitations of the telephone exchange service facilities) after the called party hangs up, automatically create a disconnect signal or on-hook condition which allows the called party's line to be released.

(e) **CONSIDERATION OF FACSIMILE MACHINE RESTRICTIONS.**—Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding to prescribe rules to restrict the use of any telephone facsimile machine or computer or other electronic device to send an unsolicited advertisement to the telephone facsimile machine of any person. In establishing such restrictions, the Commission shall consider—

(1) *the extent to which unsolicited advertisements are transmitted through telephone facsimile machines;*

(2) *the extent to which recipients of such advertisements incur costs for such receipt; and*

(3) *the most cost effective methods of preventing advertising abuses with telephone facsimile machines.*

(f) *EFFECT ON STATE LAW—*

(1) *STATE LAW NOT PREEMPTED.—Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits, either or both of the following:*

(A) *The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements.*

(B) *The use of automatic telephone dialing systems to transmit prerecorded telephone solicitations.*

(2) *STATE REGULATION OF TELEPHONE SOLICITATIONS.—If, pursuant to subsection (c), the Commission requires the establishment of a database of telephone numbers of subscribers who object to receiving telephone solicitations or a functionally equivalent methods or procedures of Federal regulation, a State or local authority may not develop any different database or system for use in the regulation of telephone solicitations and may not enforce restrictions on telephone solicitations in any manner that is not based upon the requirements imposed by the Commission.*

(3) *STATE ENFORCEMENT PERMITTED.—Nothing in this section or in the regulations prescribed under this section shall prohibit the segmentation of the database or functionally equivalent method or procedure for use by State or local authorities, nor preempt any State or local authority from creating mechanisms to enforce compliance with the database or functionally equivalent system, or a segment thereof.*

(g) *EFFECTIVE DATE OF REQUIREMENTS.—The requirements of this section shall take effect 30 days after the date that regulations are prescribed under subsection (c).*

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